The Argentine Cases: A Shadow on ICSID Arbitration?

ALICE HERBON

BA (Hons) LLB (Hons)

Barrister and Solicitor of the Supreme Court of New South Wales

Barrister and Solicitor of the Supreme Court of Tasmania

Submitted in fulfilment of the requirements for the Degree of Masters of Laws

University of Tasmania

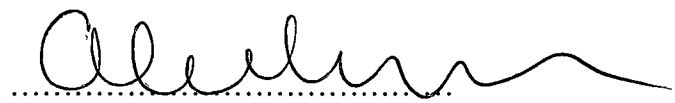
Faculty of Law

September 2009

Statements

This thesis contains no material which has been accepted for a degree or diploma by the University or any other institution except by way of background information and duly acknowledged in the thesis, and to the best of the candidate's knowledge and belief no material previously published or written by another person except where due acknowledgement is made in the text of the thesis.

This thesis may be made available for loan and limited copying in accordance with the *Copyright Act* 1968 (Cth).



Alice Herbon

Acknowledgements

Thank you to Mr Peter Lawrence and Professor Don Chalmers for supervising this thesis. Special thanks also go to Professor Gino Dal Pont for reviewing my thesis and to Associate Professor Di Nicol and Michelle Fernando for their ongoing encouragement and support.

I also acknowledge receipt of the Henry Baker Scholarship. This, together with support from the Law School, enabled me to undertake valuable research travel and greatly assisted in writing this thesis.

Tam and Anna-Lucia, thank you for every Thursday. Finally Javier, writing this thesis was bigger than we imagined, thank you for your support and for listening to me talk as if I know more about your country than you do.

ABSTRACT

The World Bank's International Centre for the Settlement of Investment Disputes ("ICSID") is frequently nominated for the resolution of investment disputes in bilateral investment treaties ("BITs"). Despite this, investment treaty arbitration under ICSID has not been frequently used. In 2000-2001 the Republic of Argentina suffered a severe economic crisis. In the wake of this crisis over forty foreign investors instituted proceedings against Argentina before ICSID for breach of BIT obligations, with an estimated value of over US$30 billion (the "Argentine Cases"). This thesis examines the first awards in the Argentine Cases and assesses the impact of these awards on the future development of ICSID arbitration.

Three major concerns arise from the analysis of the early awards. Firstly, the inconsistency between tribunals' interpretation and application of international law principles has resulted in conflicting awards regarding Argentina's key defence of necessity. Secondly, the Argentine Cases demonstrate that the limited procedural grounds for annulment available under ICSID pose significant challenges to the adequacy of the annulment procedure. This contributes to arguments for the development of an appeal facility for ICSID awards. Finally, Argentina's resistance to complying with ICSID awards in the Argentine Cases tests the compliance and enforcement mechanisms under ICSID and challenges Argentina's obligation to comply with its international obligations. The avoidance of obligations under ICSID awards may establish an unfavorable precedent of non-compliance in ICSID arbitration.

The implementation of a response to these issues in the remaining Argentine Cases will have a significant impact on how the cases affect ICSID's development. The Argentine Cases have elevated awareness of ICSID and BIT protection, and will influence both states and investors in their assessment of the costs and benefits of allowing recourse to, or relying on, ICSID arbitration. This thesis argues that the impact of the Argentine Cases on the development of ICSID arbitration will depend on how the remaining Argentine Cases address the concerns raised in this thesis.

Introduction

Bilateral investment treaties ("BITs") are international agreements which establish the terms and conditions for foreign investment by nationals of one state in the state of the other. There are currently more that 2,500 BITs in force, involving the majority of states in the world.[1] BITs provide a number of guarantees and protections for foreign investment and are promoted as creating greater economic cooperation between states, while at the same time seeking to ensure a stable framework for investment. Nearly all BITs allow for dispute resolution by arbitration. The World Bank's International Centre for the Settlement of Investment Disputes ("ICSID") is often nominated for this purpose. Until recently ICSID's caseload has been limited to a handful of cases per year. As a result, BIT protection has been under-utilised and ICSID arbitration has, aside from the occasional dispute, gone untested.

ICSID case numbers have undergone unprecedented growth in recent years, and in 2008 there are 122 proceedings before ICSID.[2] A third of these cases have been instituted by foreign investors against the Republic of Argentina in the wake of its economic crisis of 2000-2001 (hereinafter the "Argentine Cases"). There are currently 42 cases pending against Argentina and the total amount claimed by investors is estimated at over US$30 billion.[3] The aim of this thesis is to assess the impacts of the Argentine Cases on the development of ICSID arbitration.

The Argentine Cases are the first significant body of cases to be arbitrated by ICSID. The cases are remarkably similar; they arise from the same factual background and contain virtually identical claims and defences. The similarity between the cases provides a

---

[1] United Nations Conference on Trade and Development (UNCTAD) *Recent Developments in International Investment Agreements* (2006- June 2007) IIA Monitor No 3 (2007) at http://www.unctad.org/en/docs/webiteiia20076_en.pdf (9 September 2008)

[2] ICSID List of Pending Cases – Last updated 22 October 2008 at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (23 October 2008)

[3] Cibilis A, "ICSID Bleeds Argentina" *Multinational Monitor* Vol 26 (7-8) July/August 2005

foundation from which to identify trends and discrepancies in ICSID arbitration, and constitutes a unique profile for examination.

The Argentine Cases have been instituted under BITs signed by Argentina during the 1990s as part of a wide economic reform and privatisation program. Like most BITs internationally, Argentina's BITs provide for recourse to ICSID in the event of a dispute. Argentina's economic reform and privatization program sought to eradicate inflation, privatize industry, deregulate the economy and remove trade barriers. Among the reforms implemented, Argentina adopted a currency board. This was an exchange rate regime that legally guaranteed the convertibility of the Argentine currency to the US dollar on a one-to-one fixed exchange rate ("convertibility").[4] Attracted by favourable investment conditions, including BITs and convertibility, foreign investors made large capital investments in Argentina, and in the 1990s Argentina emerged as one of the highest developing country recipients of foreign investment.[5]

Argentina was unable to enforce the disciplined economic polices it needed to support its growth, and its economic success was short lived. Government spending, tax evasion and corruption were high, and Argentina had a large public debt that it struggled to pay. While convertibility attracted foreign investment, it also increased Argentina's imports and damaged competitiveness in exports. These internal factors, coupled with an increasingly unfavourable international economic environment, saw Argentina's economy begin to slow. Towards the end of the 1990s it entered a period of prolonged recession which cumulated in the financial crisis of 2000-2001.[6]

Following a freeze on bank withdrawals introduced to stop a run on Argentine banks, social unrest in Argentina escalated. Public protests were widespread and included

---

[4] Law No. 23.928 *Convertibility of the Austral* of 27 March /1991, *Boletin official de la Republica Argentina,* 27104, 28 March 1991 (See candidate's citation note at Table of Instruments)

[5] Chudnovsky D & Lopez A, *Foreign Investment and Sustainable Development in Argentina* Working Group on Development and Environment in the Americas, Discussion Paper Number 12, April 2008, 8 http://ase.tufts.edu/gdae/Pubs/rp/DP12Chudnovsky_LopezApr08.pdf (15 September 2008)

[6] The factors leading to the financial crisis of 2000-2001 are discussed in more detail at 1.3. See also Appendix 3

property destruction directed at government, banks and foreign privatized companies. A state of emergency was declared, and from 19 December 2001 to 1 January 2002 Argentina was infamously governed by five presidents in two weeks. In an attempt to halt the crisis and aid Argentina's recovery the government enacted a series of measures, including ending convertibility.

These measures impacted heavily on foreign investors in Argentina. Investors had relied on the regulatory framework in Argentina which granted long-term licenses and tariffs calculated in US dollars. In the wake of the crisis, tariff adjustments were temporarily suspended before being restructured into pesos, causing foreign investors to suffer considerable un-indemnified losses. Looking for a way to recoup losses without relying on Argentina's national legal system, foreign investors turned to the BITs signed by their home states and Argentina in the 1990s. To date, 42 investors have instituted ICSID arbitration proceedings against Argentina for breaches of BIT provisions resulting from the measures Argentina adopted during the crisis.

This thesis critically analyses the first awards in the Argentine Cases and identifies three major issues as potentially having the greatest impact on the development of ICSID: firstly, the clear inconsistencies between early awards in the Argentine Cases on the question of Argentina's key defences of necessity; secondly, issues relating to the lack of a substantive review for ICSID awards; and finally, the potential challenges to compliance with ICSID award obligations by Argentina.

The analysis of the Argentine Cases is conducted against a background of BITs and investment treaty arbitration under ICSID. This is followed by a summary of the circumstances of the Argentine crisis of 2000-2001. The analysis of the Argentine Cases adopts the sequential process of ICSID, and begins with a legal examination of the tribunals' awards in Chapter 2. The focus of this chapter is on the inconsistency between tribunals' interpretation and application of international law principles, which has resulted in conflicting awards regarding Argentina's key defence of necessity under both treaty and customary international law. The awards in *CMS Gas Transmission Company*

v The Argentine Republic[7](the "*CMS Award*") and *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v The Argentine Republic*[8](the "*LG&E Award*") form the basis for this analysis.

The divergent awards discussed in Chapter 2 lead to an examination of the review mechanisms under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ("ICSID Convention").[9] In this context Chapter 3 appraises the *ad hoc* committee's decision on annulment in *CMS v Argentina* (the "*CMS Annulment Decision*"). The chapter discusses the limited procedural grounds for annulment available under ICSID, and demonstrates how the identification of un-reviewable errors in the *CMS Award* underlines a perceived weakness in the ICSID annulment provisions.

The final stage of the analysis ponders challenges to compliance with ICSID award obligations. Chapter Four discusses indications that Argentina will not comply with ICSID awards and assesses the strength of its challenges against the mechanisms for compliance, recognition and enforcement embodied in the ICSID Convention. It examines arguments for non-compliance developed outside the ICSID framework, starting with a challenge to the constitutionality of the ICSID Convention, followed by arguments to subject ICSID awards to a review by Argentina's national courts. The chapter examines the implications of Argentina's stance on the remaining Argentine Cases, its risk profile and future reliance on ICSID arbitration as an effective dispute resolution mechanism.

---

[7] *CMS Gas Transmission Company v The Argentine Republic* ICSID Case No ARB/01/08

[8] *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v The Argentine Republic* ICSID Case No ARB/02/1

[9] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965* (entered into 14 October 1966)

In the face of the present global economic uncertainty states are actively taking measures to stabilise their economies, including strategies to prevent a run on national banks.[10] Implicit in this instability is an increasing awareness of foreign investment protection. States and investors, now more than ever, need to clearly understand their obligations and options regarding investment protection, including the provisions of BITs and ICSID arbitration. The Argentine Cases will impact on these perceptions, influencing how states assess the costs and benefits of providing private investors access to ICSID arbitration. Investors too, are likely to draw lessons from the Argentine Cases and use them to test the utility of pursing ICSID arbitration to enforce BIT protection of investments.

This thesis concludes that in order for the Argentine Cases to positively impact on the growth and development of ICSID arbitration, the remaining Argentine Cases need to respond to the lessons drawn from the early cases. The correct consideration of public international law principles and consistency in awards will establish a coherent and consistent ICSID jurisprudence and increase confidence in the system. This in turn will minimise the effects of ICSID's limited annulment regime and provide less ammunition to Argentina to avoid compliance with its obligations. It is argued that if these concerns are not addressed in the remaining cases, a dark shadow may be cast over ICSID arbitration just as it gains momentum.

Method

Research for this thesis primarily involved the analysis of ICSID awards in the Argentine Cases. This analysis was conducted against extensive research of both primary and secondary material related to the Argentine Cases. Twelve months of research were conducted in Argentina, where the candidate researched primary materials, including

[10] A number of states have drafted and/or passed bills to guarantee bank deposits in an effort to shore up investor confidence. States include: Singapore, Malaysia, Australia, New Zealand, Indonesia, Hong Kong, Denmark, Ireland, Germany and Greece: "Asian Governments Guarantee Bank Deposits" 17 October 2008, *The Age* http://news.theage.com.au/business/asia-governments-guarantee-bank-deposits-20081017-539q.html (23 October 2008)

legislation and case law, in addition to significant secondary material by way of legal journals, articles and journalistic reports.

Scope

The Argentine Cases are at an early stage. Out of forty two cases instituted, only seven awards have been awarded. One annulment decision has been made, four annulment decisions are pending and five cases have been settled.[11] Studying the Argentine cases at this early stage allows for key lessons to be drawn out early, the consideration of which may influence the impact the Argentine Cases will ultimately have on the development of ICSID arbitration.

In addressing the aim of this thesis certain boundaries have been adhered to. Firstly, primary research for this thesis was concluded on 31 August 2008 and the analysis in this thesis relates to the law at that date. Proceedings are ongoing and since the research cut-off date the decision in *Continental Casualty Company v The Argentine Republic*[12] has been awarded. While it was not possible to include this award in my analysis, an initial reading of the award validates many of the arguments made in this thesis. It confirms the requirement for the application of principles of public international law and treaty interpretation relating to Argentina's defence of necessity, discussed in Chapter 2 and lends support to arguments relating to the value of the *ad hoc* committee's *obiter dicta* statements in the *CMS Annulment Decision* discussed in Chapter 3.

Secondly, the thesis does not seek to provide a conclusive commentary on the political, social and economic consequences of the Argentine crisis in 2001-2002. It does not address the causes or effects of this crisis on Argentina or its people except insofar as they relate directly to the Argentine Cases.

---

[11] See Appendix 1

[12] *Continental Casualty v The Argentine Republic* ICSID Case No ARB/03/9

Thirdly, there is currently a strong trend in Latin America to move away from capitalism and free market economies. Any arguments in this thesis that allude to, or lend support to this stance, are limited to the development of ICSID, including the acceptance by states of ICSID as a dispute resolution system. This thesis does not seek to analyse changes to the political standing of Latin American states.

Finally, any discussion of foreign investment carries with it the inherent imbalance between states seeking to attract investment and the home states of large corporations promoting that investment. These issues do not form part of the substantial discussion of this thesis. However, as concepts they are implicit in assessing how the Argentine cases are likely to influence state and investor behaviour.

Chapter 1

The Argentine Cases in Context

1.1 Introduction

In order to appreciate the impact of the Argentine Cases on the International Centre for the Settlement of Investment Disputes ("ICSID"), it is important to consider the cases in the appropriate context. The first section of this chapter consists of a brief background to the development of laws relating to foreign investment. It focuses on the development of bilateral investment treaties ("BITs") and the referral of disputes to ICSID as the legal framework for the Argentine Cases. The chapter then discusses the factual background to the Argentine economic crisis. It begins by providing an overview of foreign investment in Argentina, before summarising recent developments in the Argentine economy, from the dramatic increase in foreign investment and spectacular economic growth during the early 1990s, to the rapid downturn in late 1998 to 2001. The chapter identifies the key events leading up to Argentina's economic crisis of 2000-2001 and discusses how those elements affected foreign investors in Argentina. This contextual discussion concludes with a brief overview of the Argentine Cases. A summary of the central claims and awards in those cases provides a springboard for the more detailed analysis in subsequent chapters.

1.2 Foreign Investment

Foreign investment involves a minimum of two states: the "home state" where investors maintain their nationality, and the "host state" where investments are physically located or where, in relation to intangible assets, the economic value of those assets is realised.[1] It

[1] Sornarajah M, *The International Law on Foreign Investment*, 2nd Edition, Cambridge University Press, Cambridge, 2004, 5. Traditionally "home states" are richer developed countries while host states, those receiving the investment, are poorer or developing states. The author acknowledges that this classification has exceptions, however because the Argentine Cases reflect this division, the terminology will be used throughout this thesis.

differs from other international business transactions, such as international trade, in that the foreign investment transaction is intrusive and typically involves ownership in a foreign state, intended to set up a long term relationship with a party in the host state, either with the state itself or with a state entity. Foreign investment is vital for economic development and prosperity.[2] It allows host states to develop local industries and infrastructure and to recover funds from foreign investors. Meanwhile investors obtain financial returns and establish footholds in emerging developing economies.[3]

1.2.1 Brief history of foreign investment laws

During the seventeenth, eighteenth and nineteenth centuries foreign investment was largely part of colonial expansion. The need for an international law on foreign investment in this period was perceived as minimal, and military force and diplomacy were the principal vehicles for protecting foreign investment.[4] Decolonisation began during the twentieth century. This process saw the emergence of newly independent but economically underdeveloped states. Many of these states resented foreign control over production and interference in domestic affairs; as a result, they closed their doors to new foreign investment and began to nationalise existing property.[5] Developed countries had invested large amounts in many of these newly independent states while they were colonies, and governments were determined to protect the rights of their nationals who

---

[2] There is considerable conflict regarding the benefits of foreign investment on host states. To this extent benefits such as technology transfer to foreign affiliates and domestic firms, deeper and more linkages with local enterprises, higher exports, higher employment and upgraded skills need to be balanced against negative effects related to foreign investment, such as financial volatility, anti-competitive practices, abusive transfer prices, the crowding out of domestic firms and too much dependence on foreign ownership. See generally, United Nations Conference on Trade and Development *Issues Related to International Arrangements*" TD/B/COM.2/45 9 December 2002, par 9 at http://www.unctad.org/en/docs/c2d45_en.pdf (23 October 2008); "Foreign Direct Investment: A Lead Driver for Sustainable Development" *Towards Earth Summit* Economic Briefing Series No. 1 at http://www stakeholderforum.org/fileadmin/files/SF_Briefing_Papers/bp_FDI.pdf (23 October 2008)

[3] Franck S D, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 *Fordham Law Review* 1521, 1537

[4] Vandevelde K J, "A Brief History of International Investment Agreements, Symposium: Romancing the Foreign Investor: BIT by BIT" (2005) 12 *U C Davis Journal of International Law and Policy* 157, 161

[5] Ibid, 166

had made these investments.[6] Thus the protection of foreign investment emerged as a crucial concern.

As the economic powers, most notably Great Britain and the United States, moved away from military protection, they turned to international legal standards to protect their investments. Rather than regulation by the host states' national laws, they claimed that foreign investment was to be accorded a minimum international standard, the most important aspect being the requirement for "prompt, adequate and effective compensation" in the event of expropriation. This standard was to become known as the "Hull Formula."[7]

The "international" standard propounded by the economic powers attracted increasing dissent. Latin American countries refused to recognize an international standard, instead adhering to the "Calvo Doctrine", under which foreign investors were only entitled to the treatment that the host country afforded its own investors.[8] Middle Eastern states and Russia also resisted the "Hull Formula"; although conceding to some form of

---

[6] Von Moltke K & Mann H, *Towards A Southern Agenda on International Investment. Discussion Paper on the Role of International Investment Agreements* International Institute for Sustainable Development, 3 at http://www.iisd.org/pdf/2004/investment_sai.pdf (2 October 2008)

[7] The requirement of full compensation for expropriation was most clearly articulated in the 1930s when it was challenged by the government of Mexico. Mexico confiscated various properties between 1915 and 1940. The United States, whose nationals suffered from these acts of expropriation, sought compensation for its affected citizens. In response to the takings by Mexico, the American Secretary of State, Cordell Hull, put forth what has become the leading formulation of the full compensation standard:

> The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore.

See, Guzmán A, *Explaining The Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties That Hurt Them*, 1997 at http://www.jeanmonnetprogram.org/papers/97/97-12.html (2 October 2008)

[8] The doctrine is named after Carols Calvo, an Argentine foreign minister and jurist. In his writings *Le Droit International* (vol. 6, 5th ed., 1885) Calvo said: "Aliens who establish themselves in a country are certainly entitled the same rights of protection as nationals, but they cannot claim any greater measure of protection"; Schreuer C, "Calvo's Grandchildren: the return of local remedies in investment arbitration" (2005) 4 *The Law and Practice of International Courts and Tribunals* 1, 3

international rule, these states tended to uphold a lesser standard of "adequate" compensation.[9]

The emergence of the Soviet Bloc led by the former Soviet Union involved massive expropriation of foreign held assets. Its economic success at this time encouraged developing countries in the view that economic relations with the developed countries of Western Europe and North America would be inherently exploitative, and that the best path to economic development lay in extensive state regulation of the economy rather than the free market.[10] The collapse of this ideal would have the reverse effect some years later.

The collective efforts of developing states' challenge to strict investment protection resulted in a series of declarations and resolutions in the United Nations General Assembly. In 1962 the *Resolution on Permanent Sovereignty over Natural Resources*[11] recognized a state's basic right to nationalise and freely exploit its natural resources. A 1972 resolution moved further towards the Latin American view of domestic legal control over expropriation disputes, adopting national treatment as the only requisite standard.[12] Finally, in 1974 the General Assembly passed the *Charter of Economic Rights and Duties of States*, which endorsed a state's right to freely regulate foreign investment and provided a set of standards to which capital exporting states and their investors were obligated to conform.[13] In addition to development of conflicting principles, home states

---

[9] Robbins J, "The Emergence of Positive Obligations in Bilateral Investment Treaties" (2006) 13 *University of Miami International and Comparative Law Review* 403, 411

[10] Vandevelde K J, above n4, 167

[11] *Permanent Sovereignty over Natural Resources*, United Nations General Assembly Resolution 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962) at http://www1.umn.edu/humanrts/instree/c2psnr.htm (20 April 2007)

[12] United Nations General Assembly Resolution 3041 (XXVII) endorsing the Trade and Development Board's resolution 88 (XII) of October 19, 1972 that compensation natural resources nationalisation cases was to be fixed by the nationalizing state with jurisdiction for such cases falling within the sole jurisdiction of the nationalizing country's courts See, Guzmán A, Elkins Z & Simmons B, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000 (2005) paper 31 presented at *American Law & Economics Association Annual Meetings*, 4

[13] United Nations General Assembly Resolution 3281, U.N. GAOR, 29th Sess., Supp. No.31, at 50, U.N. Doc. A/9631 (1974); Vandevelde K J, above n4, 168

were subject to a series of under-compensated expropriations of foreign investments around the world.[14]

1.2.2 Bilateral investment treaties

In response to the eroding consensus on the development of international law principles regarding foreign investment law and the threat of uncompensated expropriation, developed countries created an instrument to protect investment in a more effective and less controversial manner, the BIT.[15] BITs provide parties with the opportunity to set out norms that apply to investments in each other's territory.[16] Although countries negotiate BITs individually, they are usually similar in organisation and content and the terms are usually dictated by traditional home states which hold the capital for the investment.[17] BITs exhibit two fundamental innovations: they provide a series of substantive rights to investors aimed at securing foreign investment and stabilizing the host states investment climate;[18] and they offer investors direct remedies to address violations of those substantive right through arbitration on a state-to-state or investor-to-state basis.[19]

The substantive rights of BITs typically involve the following:[20] (1) the payment of adequate compensation following expropriation of investments; (2) the free flow of capital, including a right to repatriate profits and other investment-related funds; (3) a

---

[14] These included the nationalisation of British oil assets by Iran in 1951, the expropriation of Liamco's concessions in Libya in 1955, the nationalisation of the Suez by Egypt in 1956 and the nationalisation of sugar interests by Cuba in the 1960's; Guzmán A, Elkins Z & Simmons B, above n12, 3-4

[15] Wong J, "Umbrella Clauses in Bilateral Investment Treaties: of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes" (2006) 14 *George Mason Law Review* 135, 141

[16] Sornarajah M, above n1, 213

[17] This is due in part to the large number of investment treaties based on model BITs which often use common sources, such as the 1967 *Organization for Economic Co-operation and Development* (OECD) *Draft Convention on the Protection on Foreign Property*; Vandevelde K J, "The economics of bilateral investment treaties" (2000) 41 *Harvard International Law Journal* 469, note 3. See also, Von Moltke K & Mann H, above n6, 4

[18] Franck S D, above n3, 1529

[19] Von Moltke K & Mann H, above n6, 6

[20] See generally Franck S D, above n3, 1531-1532 & Von Moltke K & Mann H, above n6

guarantee of national treatment[21] and sometimes a promise to treat states as favourably as other foreigners, the most-favoured-nation ("MFN") provision;[22] (4) the promise of fair and equitable treatment; (5) the promise of full protection and security to an investment; (6) a guarantee of minimum international standards of treatment; and (7) an agreement to honour all other commitments regarding an investment (the "umbrella clause").[23]

Initially states were slow to sign BITs. From 1959 to 1969 only 75 BITs were concluded, fewer than seven per year. This increased slightly from 1970 to 1979 to just over nine per year.[24] The 1980s and 1990s saw a dramatic increase in the conclusion of BITs, and by the end of 2006 the number of BITs had reached 2,573.[25] Today the BIT is one of the most widely used international agreements for protecting and influencing foreign investment[26] and over 170 countries are party to at least one BIT.[27]

The rapid rise in BITs in the 1980s and 1990s can be attributed to two main factors, the global victory of market ideology, and the lack of alternative sources of capital available to the developing world.[28] The rise of free market economies associated with the Reagan government in the United States and the Thatcher government in the United Kingdom gave a vigorous push to the liberalization of investment regimes.[29] This drew support

---

[21] Meaning investors cannot be treated worse than the state's own citizens.

[22] A MFN provision enables investors to profit from more favourable provisions given to nationals of third states. The leading case of *Emilio Agustín Maffezini v Kingdom of Spain* ICSID Case No ARB/97/7 held that a foreign investor protected by an investment treaty with an MFN provision was able to rely on the better dispute resolution provisions in a treaty made by the respondent with a third state.

[23] An umbrella clause is designed to allow for a breach of any relevant investment contract to be resolved under treaty in an international forum. It requires that each state observe all investment obligations it has assumed. The clause brings otherwise independent investment agreements under the treaty's umbrella of protection; Wong J, above n15, 143

[24] Vandevelde K J, above n4, 172

[25] United Nations Conference on Trade and Development, *Recent Developments in International Investment Agreements* (2006- June 2007) IIA Monitor No. 3 (2007) at http://www.unctad.org/en/docs/webiteiia20076_en.pdf (9 September 2008)

[26] Guzmán A, Elkins Z & Simmons B, above n12, 4

[27] Vandevelde K J, above n4, 184

[28] Sornarajah M, above n1, 215

[29] The Washington Consensus is evidence of the widespread acceptance of these ideals. See below n76 and accompanying text.

from the evident success of several Asian economies, such as Hong Kong and Singapore which adopted liberal attitudes to foreign investment, compared to the collapse of the Soviet Union and the failure of other developing countries that had operated under more restrictive models. [30] This comparison lessened hostility to foreign investors and a market economy. The overall decrease in the developed world's provision of traditional development assistance during the 1980s was also a contributing factor. With foreign investment as one of the only sources of capital available for economic development, developing countries had little alternative but to liberalise their investment regimes, accepting the BIT regime in order to attract this investment.[31] The influence of these factors on developing states to sign BITs was based on a strong presumption by host states that signing BITs would increase inward flows of foreign investment.[32]

1.2.3 Resolution of foreign investment disputes in international law

Traditionally, foreign investment disputes had no way of overcoming the lack of legal personality held by a private person at international law. Despite the presence of a BIT, an individual lacks legal standing at international law. This meant that any legal action taken in relation to an investment is limited to actions available under the national laws of

---

[30] Vandevelde K J, above n4, 177

[31] Sornarajah M, above n1, 274

[32] The hypothesis that BITs attract foreign investment has been widely questioned. For example 80 percent of foreign investment from the US is directed at three countries: Mexico, China and Brazil. The US has an investment agreement with Mexico (the *North American Free Trade Agreement*), however it has no agreement with either China or Brazil. See Stanley L & Mortimore M, "Obsolescencia de la proteccion a los inversores extranjero despues de la crisis argentina" *Revista de la CEPAL,* April 2006, 24

Commentators argue that factors such as market size and stability and the availability of natural resources can have a greater influence than investment agreements in attracting foreign investment. Others acknowledge that the impact of BITs will depend on the level of risk the importing state poses to investments within its state. See, eg, Tobin J & Rose-Ackerman S, "Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties" *William Davidson Institute Working Paper No 587,* 13 November 2003, at http://www.bus.umich.edu/KresgeLibrary/Collections/WorkingPapers/wdinum.htm (20 October 2008); Hallward-Driemeier M, "Do bilateral investment treaties attract FDI? Only a bit...and they could bite" Policy Research Working Paper 3121 *The World Bank Development Research Group, Investment Climate,* August 2003; Von Moltke K & Mann H, above n6, 7

the host state, or to protective actions of its home state's diplomatic protection under international law.[33]

Diplomatic protection is a mechanism designed to secure reparation for injury to the national of a State premised largely on the principle that an injury to a national is an injury to the State itself. The International Law Commission has recently completed its codification of the principles of the customary international law of diplomatic protection.[34] The mechanism for a home state to protect its investors is "espousal", namely the assumption by a state of an injured person's claim as is its own and presenting it against the state that has injured the national in an international court or tribunal.[35] The shortcomings of diplomatic protection are well known: the need to exhaust local remedies before resort can be made to an international claim; the restrictive rules on nationality of the legal person and the difficulties surrounding this for multinational corporations, shareholders and other legal entities.[36] There is no enforceable obligation for a home state to exercise diplomatic protection, nor does an individual legal entity have any control over the claim, which leaves the home state free to settle on any terms it chooses and with no guarantee the state will pass on any benefits gained from the settlement to the investor.[37] While the built-in deterrents of exercising diplomatic protection in terms of the potential for collateral diplomatic fall-out in doing so and the fact that the existence of a claim to diplomatic protection did not necessarily mean that a forum would be available in which the dispute could be resolved, still less did it ensure that any award which was rendered would be enforceable. For example, the only enforcement tool available under the International Court of Justice ("ICJ") is the enactment of a Security Council

---

[33] Von Moltke K & Mann H, above n6, 30

[34] International Law Commission, "Draft Articles on Diplomatic Protection with Commentaries", A/61/10 *Yearbook of the International Law Commission,* Vol II, Part Two, 2006 at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf (30 June 2009)

[35] Vandevelde K J, above n4, 160

[36] International Law Commission, above n34

[37] Ibid

Resolution, a limited remedy when an investor seeks financial compensation.[38] Investors are also limited by the fact that recourse to the ICJ is only available to states which are a member of the United Nations.[39]

1.2.4 Investment treaty arbitration under ICSID

One of the most important components of modern foreign investment law is the mechanism created to remove investment-related disputes from the political realm, dependent on espousal and diplomacy, to the legal realm through arbitration.[40] The inclusion of arbitration provisions in BITs was prompted by the conclusion of the ICSID Convention in 1965.[41] The ICSID Convention was formulated by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) and it established the International Centre for the Settlement of Investment Disputes.[42]

The provision for ICSID arbitration of investment disputes in BITs has become a permanent feature of foreign investment. This is illustrative of its growing status among states. The ICSID Convention currently has 155 Contracting States[43] and, of the current BITs currently in existence, more than 1,500 provide for ICSID as a forum for the settlement of investment disputes.[44] There is a general consensus among commentators

---

[38] Franck S D, above n3, 1537

[39] See, http://www.icj-cij.org/icjwww/icjhome.htm

[40] Robbins J, "The Emergence of Positive Obligations in Bilateral Investment Treaties" (2006) 13 *University of Miami International and Comparative Law Review* 403, 414

[41] The ICSID Convention was submitted to prospective member states for signature on 18 March 1965 and entered into force on 14 October 1966. The provisions of the ICSID Convention are complemented by rules. The ICSID Convention article 6(1)(a)-(c) establishes *ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* and *ICSID Rule of Procedure for Conciliation Proceedings (Conciliation Rules)*

[42] ICSID Convention, article 1

[43] List of Contracting States and other signatories of the Convention (as of November 4 2007) ICSID/3 at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main (9 September 2008)

[44] Dañino R, "Opening Remarks of the OECD/ICSID/UNCTAD SYMPOSIUM" *Making the most of International Investment Agreements: a Common Agenda* Paris, France, 12 December 2005

There are other methods of dispute resolution and BITs usually offer the choice between two or more options for international arbitration. Typically the choice will be between ICSID arbitration on the one hand and a tribunal operating under the rules of the *United Nations Commission on International Trade Law Arbitration Rules*

that over half of investment treaty disputes are referred to ICSID,[45] although confidentiality issues preclude a definitive figure.[46]

The increase in the volume of foreign investment in recent decades from some US$299,598 million in 1990 to $1,215,789 million in 2006[47] has coincided with an increasing number of foreign investment disputes. A decade ago, ICSID had a caseload of five pending cases for an aggregate amount of US$15 million; in October 2008 122 cases were pending[48] and the cases against Argentina alone are estimated at over US$30 billion.[49] Current data indicates that at least 73 states have faced investment treaty arbitration as defendants. Argentina tops this list with 46 claims lodged against it.[50]

The ICSID Convention established ICSID as an autonomous international institution.[51] Its purpose is to resolve investment disputes by means of two different procedures; conciliation and arbitration.[52] ICSID itself does not engage in the task of conciliation or arbitration, this is the task of the Conciliation Commission and the Arbitral Tribunal

---

(UNCITRAL Arbitration Rules) the *International Chamber of Commerce Rules of Arbitration* (entered into force 1 January 1998) (ICC Arbitration Rules) or the *Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, (entered into force January 2007). See, Franck S D, above n3, 1541

[45] See, Franck S D, above n3, note 78

[46] In 2007 the total number of known investment treaty cases reached 290. The majority of these disputes were filed with ICSID (182), with the remainder filed with UNCITRAL (80), the Stockholm Chamber of Commerce (14), the ICC (5) and ad hoc arbitration (5). A further case was filed with the Cairo Regional Centre for International Commercial arbitration, and another was administered by the Permanent Court of Arbitration: United Nations Conference on Trade and Development, *Latest Developments in Investor-State Dispute Settlement* IIA Monitor No. 1 (2008) UNCTAD/WEB/ITE/IIA/2008/3 at http://www.unctad.org/en/docs/iteiit200511_en.pdf (9 September 2008)

[47] United Nations Conference on Trade and Development, WIR Annex tables # 12 *Outward foreign investment flows, by Host Region and Economy, 1970-2006*, 10/10/07 at http://www.unctad.org/Templates/Page.asp?intItemID=3277&lang=1 (9 September 2008)

[48] ICSID List of Pending Cases – Last updated 22 October 2008 at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (23 October 2008)

[49] Cibilis A, "ICSID Bleeds Argentina" *Multinational Monitor* Vol 26 (7-8) July/August 2005

[50] 42 of these cases make up the Argentine Cases.

[51] ICSID Convention, articles 18-24

[52] ICSID Convention, article 1(2). This thesis will only deal with the arbitration procedure.

respectively, which are constituted pursuant to the ICSID Rules for the purpose of adjudicating investment disputes.[53]

ICSID arbitration proceedings are instituted with a request for arbitration by one party, addressed to the Secretary General.[54] Jurisdiction of the ICSID Convention is based upon article 25(1) of the Convention, which states in relevant part:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally...

Jurisdiction can be broken into four basic elements: (1) the dispute must arise from an investment; (2) the dispute must be a legal dispute; (3) one party must be a Contracting State or a designated subdivision thereof, and the other party must be a national of another Contracting State; and (4) both parties must have consented on writing.[55]

Though the concept of "investment" is central to the ICSID Convention, it leaves the term undefined. The parties must therefore define what kinds of investments they wish to bring to ICSID. A clause in an investment contract referring a dispute to ICSID is considered a strong indication that the parties considered their transaction an investment.[56] Where consent to jurisdiction is based on a BIT, no inference can be drawn. In these cases the BIT usually contains a definition of "investment". As a general rule, the definition of investment is introduced by a broad general description followed by a non-exhaustive list of typical rights. It usually includes traditional property rights, participation in companies, money claims and rights to performance, intellectual and industrial property rights, and concessions or similar rights.[57] This approach has allowed

---

[53] In this sense, references in this paper to "ICSID award(s)" are for convenience only.

[54] ICSID Convention, articles 28 & 36

[55] MacKenzie G W, "ICSID arbitration as a strategy for leveling the playing field between international non-governmental organizations and host states" (1993) 19 *Syracuse Journal of International Law and Commerce* 197, 222

[56] Schreuer C, *The ICSID Convention. A Commentary* Cambridge University Press, Cambridge, 2001, 126, pars 92-104

[57] Ibid, 129 par 99

ICSID to give a broad interpretation of the term and allowed ICSID to hear disputes arising from contracts to provide managerial services, to train sailing crews and to construct low income housing.[58]

As with all arbitral institutions, consent is the "cornerstone of the jurisdiction of the Centre".[59] The most obvious method for consent is on the basis of an arbitration clause in the foreign investment contract. State consent is also widely accepted as being contained in the BIT itself through the dispute resolution clause, which is generally understood to constitute a unilateral offer by a state to settle a dispute by arbitration, which investors accept by instituting arbitration proceedings.[60]

Generally BITs provide a clause referring disputes concerning the investment of an investor in the territory of the host state to ICSID arbitration. Despite this the majority of BITs contain no specific provisions indicating the nature of disputes to be submitted to ICSID; whether only disputes for breach of a BIT, or whether it extends to the resolution of disputes for breach of contract or local law.[61] The ambit of protection given by a BIT will depend on the agreements between the parties under either treaty or contract or both.[62]

The ICSID process follows a relatively standard set of procedures including: (1) submitting a notice of dispute to the State; (2) complying with applicable waiting periods;

---

[58] MacKenzie G W, above n55, 225

[59] ICSID, *Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) 4 ILM 524, 23 cited in Sornarajah M, *The Settlement of Foreign Investment Disputes*, Kluwer Law International, The Netherlands, 2000, 208

[60] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* ICSID Case No ARB/84/3 (Decision on Jurisdiction); *Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka* ICSID Case No ARB/87/3; 30 ILM 577 (1991) holding that a dispute resolution provision in a BIT submitting future disputes to ICSID was sufficient to constitute jurisdiction. See, Franck S D, above n3, 1542-1543. For a detailed discussion on the controversial nature of constructing consent in this manner see Sornarajah M, above n59, 208-222

[61] McLachlan C, Shore L & Weiniger M, *International Investment Arbitration,* Oxford University Press, 2007, 46- 47

[62] The line between treaty and contract claims will depend, among other factors, on the existence or otherwise of an "umbrella clause". An umbrella clause extends the scope of BIT protection to specific undertakings entered into by contract or otherwise with investors of the other contracting state, bringing those undertakings under the "umbrella" of BIT protection. It should be noted that not all BIT claims are based on contract; Ibid, Part II, Guzmán A, above n7, 7

and (3) electing where to resolve the dispute. The next significant step is the appointment of the tribunal. Parties have considerable freedom regarding the constitution of the tribunal, and any agreements as to the number of arbitrators and the method of their appointment is to be communicated to ICSID. ICSID maintains a Panel of Arbitrators,[63] but parties may appoint arbitrators from outside this Panel, provided the appointee(s) possess the qualities prescribed by article 14(1).[64] In the absence of agreement, the designated tribunal consists of three arbitrators, one appointed by each of the parties. The President of the tribunal is appointed by agreement between the parties or, where agreement is lacking, by the Chairman of the World Bank.[65]

Investment treaty arbitration is based on a strong presumption of confidentiality. ICSID is considered to have greater transparency than other international arbitration institutions, principally because it maintains a public list of all cases being arbitrated before it. ICSID will not publish an award without the consent of the parties, but it is required to publish its "legal reasoning".[66] In practise almost all ICSID awards are made public by one of the parties.[67] The actual proceedings and related documents of ICSID arbitration, including pleading and evidence, are closed to the public.[68]

---

[63] ICSID Convention, article 3. See also ICSID Convention, articles 12-16 which outline the manner and terms of the designation of the Panel of Arbitrators

[64] As required by ICSID Convention, article 40(2). ICSID Convention, article 14(1) requires arbitrators to be of high moral character and to have recognized competence in the fields of law, commerce, industry or finance

[65] ICSID Convention, articles 37 & 38

[66] ICSID Convention, article 48(5) provides:

> The Centre shall not publish the award without the consent of the parties.

Arbitration Rules rule 48(4) reiterates article 48(5) and provides:

> ...the Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.

This has no direct implication on the parties to proceedings but is relevant when considering ICSID's contribution to the development of international law principles.

[67] Evidenced by the relative number of awards published at www.worldbank.org/**icsid**

[68] Peterson L, "Research Note: Emerging Investment Treaty Arbitration and Sustainable Development" *Editor-Invest_SD News Bulletin* International Institute for Sustainable Development (IISD), 2006. The Arbitration Rules articles 6, requires arbitrators to sign a form promising to keep all information confidential

1.3 Foreign Investment and the Argentine Economy

The Argentine Cases arose out of, or in connection with, a severe economic crisis suffered by Argentina in 2001-2002. In order to properly understand the Argentine Cases, it is important to have a clear understanding of the background to foreign investment in Argentina, including the massive push for foreign investment in the 1990s. It is also vital to provide a clear overview of events leading up to Argentina's economic crisis in 2000-2001 and the measures taken by Argentina which constitute the basis for claims in the Argentine Cases. This section provides this context, beginning with an overview of Argentina's history of foreign investment, followed by a discussion of its economic success under a privatisation regime in the early 1990s, and the deterioration of the country's performance in the second half of 1998.[69]

1.3.1 History of foreign investment in Argentina

Foreign investment played a key role in Argentina's modern history. From the 1860s to the 1930s foreign investment from the United Kingdom in rail, agricultural exports, public utilities and banking were particularly important.[70] Foreign investment decreased during the Great Depression of the 1930s and did not revive until the *Desarrollista* (developmentalist) government of President Frondizi in 1958.[71] Frondizi launched an ambitious industrialization program which relied on foreign investors as key participants.

Increasing concerns about the presence of foreign investors in Argentina, and their share of market power, led governments of the late 1960s and 1970s to restrict and control foreign investors' activities in Argentina.[72] This trend was reversed by the military dictatorship which took office in 1976. As part of a pro-market reform, the dictatorship

---

[69] See also, Appendix 3 for a detailed chronology of events pertaining to the Argentine Crisis.

[70] Chudnovsky D & Lopez A, *Foreign Investment and Sustainable Development in Argentina* Working Group on Development and Environment in the Americas, Discussion Paper Number 12, April 2008, 4 at http://ase.tufts.edu/gdae/Pubs/rp/DP12Chudnovsky_LopezApr08.pdf (15 September 2008)

[71] Ibid.

[72] Ibid.

passed the *Foreign Investment Act*,[73] which saw a shift from a policy of control of foreign investment to its promotion. The Act eliminated all general restrictions on foreign investment, guaranteeing equal rights and obligations to foreign and local investors (national treatment), authorising the calculation of used capital goods and immaterial assets as equity capital, and guaranteeing the free remittance of profits and principal.[74] Despite this, foreign investment inflows were not significant during the military government; it was not until the late 1980s, when democracy was restored, that more significant changes to foreign investment regulation occurred.

1.3.2 Economic evolution: privatisation and convertibility

The 1980s in Argentina were characterised by deep recession, hyperinflation and banking collapses, which collectively destroyed domestic and international confidence in the Argentine currency and government economic policy. In 1989 Carlos Menem was elected as Argentina's president. Menem set out to reverse the economic decline of the country. His administration's policy centred on high growth and low inflation, implemented by disciplined macroeconomic policies and market-orientated structural reform,[75] which closely followed the ideals of the Washington Consensus.[76] Among other things, the

---

[73] *Foreign Investment Act*, Law 21 382 of 12 August 1976, *Boletin Oficial de la Republica de Argentina*, 19 August 1976

[74] A small number of restrictions enacted by specific legislation continued to exist in certain sectors. Bouzas R & Chudnovsky D, Bouzas R & Chudnovsky D, "Foreign Direct Investment and Sustainable Development. The Recent Argentina Experience" Universidad de San Andrés Victoria (Argentina) 2005, part 3(a)

[75] International Monetary Fund (IMF), Policy Development and Review Department *Lessons from the Crisis in Argentina* 8 October 2003, 6

[76] The Washington Consensus was first presented in 1990 to describe a relatively specific set of ten economic policy prescriptions considered to constitute a standard reform package promoted for crisis-racked Latin American countries by Washington-based institutions such as the International Monetary Fund, World Bank and US Treasury Department:

- *Fiscal Discipline*
- *Reordering Public Expenditure Priorities* to basic health and education and infrastructure
- *Tax Reform* to combine a broad tax base with moderate marginal tax rates
- *Liberalizing Interest Rates*
- *A Competitive Exchange Rate*
- *Trade Liberalization*

government sought the eradication of inflation, the privatisation of industry, the deregulation of the economy, openness to foreign investment and the removal of trade barriers.

a) Privatisation

To achieve these objectives, the government began an active programme of privatizing state assets. Privatisation commenced in 1989 and was developed through changes to the governing legal and regulatory framework of foreign investment. Chapter IV of the *Economic Emergency Act*[77] brought new flexibility to foreign investment by eliminating authorization requirements in the information, telecommunication and electronic sectors.[78] That year also saw the enactment of the *State Reform Act*,[79] which provided the basic legal framework for the privatisation process and governed the transfer of the majority of public sector firms to the private sector, in areas as diverse as telecommunications, ports, energy, airlines, railways, electricity generation and distribution, and sanitation.[80] The government lifted the ban on new exploration and

---

- *Openness to Foreign Direct Investment*
- *Privatisation of State Enterprises*
- *Deregulation* on barrier to entry and exit or restricting competition
- *Property Rights*

Williamson J, "A Short History of the Washington Consensus" Senior Fellow, Institute for International Economics Paper commissioned by Fundación CIDOB for a conference *From the Washington Consensus towards a new Global Governance* Barcelona, September 24–25, 2004 at http://www.iie.com/publications/papers/williamson0904-2.pdf (15 September 2008)

[77] *Economic Emergency Act,* Chapter IV Foreign Investment Regime, Law 23697 of 15 September 1989, *Boletin Oficial de la Republica Argentina*, 25 September 1989

[78] Bouzas R & Chudnovsky D, above n74, part 3(a)

[79] *State Reform Act,* Law 23.696 of 18 August 1989, *Boletin Oficial de la Republica Argentina*, 26702, 23 August 1989

Within this broad framework specific instruments were enacted to govern the privatisation of the main industries. For example in the Gas Industry the *Gas Law* (Law 24.076 of 7 July 1991 on the Regulation of Natural Gas, *Boletin Oficial de la Republica Argentina*, 12 July 1992; the *Gas Decree* (Decree 1738/92 of 18/ September 1992 which regulates the transportation and distribution of natural gas as a public service, prices, import-export, enforcement authority of the law and general policy principles applicable to the privatized company providing natural gas, *Boletin Oficial de la Republica Argentina*, 28 September 1992 and *Gas Decree* (Decree 2255/92 of 2 December 1992 which provides for the regulation of transportation and distribution of natural gas, *Boletin Oficial de la Republica Argentina*, 7 December 1992)

exploitation licences on mining, petroleum and natural gas production, and deregulated the internal and external trade in crude petroleum and fuels.[81] Foreign investors were given national treatment for all incentives enjoyed by nationally-owned firms and were guaranteed free remittance of profits and capital.[82]

b) Convertibility

With the deregulation of foreign investment came the cornerstone of Menem's economic reform, convertibility.[83] Convertibility was a type of currency board under which the Argentine currency was fixed to the United States dollar. The regime entailed that the national currency, the peso,[84] was freely convertible with the United States dollar at an exchange rate of one-to-one. The system required the central bank to keep enough dollars or gold in reserve to back the total amount of pesos that had been printed. This prevented the government from creating unbacked currency or "running the printing press", and thus limited inflation.[85] The aim of convertibility was to contribute to the integrity of the monetary system and foster the stability necessary for business and investors. As described by the IMF in 2004:

> The Convertibility Law, which pegged the Argentine currency to the U.S. dollar in April 1991, was a response to Argentina's dire economic situation at the beginning of the 1990s. Following more than a decade of high inflation and economic stagnation, and after several failed attempts to stabilize the economy, in late 1989 Argentina had fallen into hyperinflation and a virtual economic collapse [...] The new exchange rate regime, which operated like a currency board, was designated to stabilize the economy by establishing a hard nominal peg with credible assurances of non reversibility. The new peso (set equal

---

[81] Bouzas R & Chudnovsky D, above n74, part 3(a)

[82] Temporary restrictions could be enforced for balance of payments purposes, this occurred in December 2001. Bouzas R & Chudnovsky D, above n74, part 3(a)

[83] *Convertibility of the Austral,* Law 23.928 of 27 March 1991, *Boletin official de la Republica Argentina,* 27104, 28 March 1991 Convertibility was introduced by Menem's Minister of the Economy Domingo Cavallo, who was appointed in early 1991 after the Menem administration's unsuccessful attempts to stabilise the economy

[84] *Changes to denomination and value of currency,* Decree 2128/91 of 10/10/199, *Boletin official de la Republica Argentina,* 17 October 1991 changed the denomination and value of the national currency into pesos at one peso for each 10,000 Australes, it also established the parity of one peso to one dollar.

[85] For an in depth analysis of the Argentine convertibility regime and its differences from an orthodox currency board see Hanke S & Schuler K, "What went wrong in Argentina" (2002) 12(3) *Central Banking Journal,* 43

> to 10,000 australes) was fixed at par with the U.S. dollar and autonomous money creation by the central bank was severely constrained, though less rigidly than in a classical currency board. The exchange rate arrangement was part of a larger Convertibility Plan, which included a broader agenda of market-oriented structural reforms to promote efficiency and productivity in the economy. Various service sectors were deregulated, trade was liberalized, and anti-competitive price-fixing schemes were removed; privatisation proceeded vigorously, notably in oil, power, and telecommunications, yielding large capital revenues. [86]

Convertibility led to the "dollarization" of the economy in the sense that contracts, especially long term contracts, were expressed in dollars rather than pesos, and bank deposits were opened and maintained in dollars.[87]

1.3.3 International reform by Argentina

In addition to unilateral domestic policy reforms, the Argentine government was an active participant in international negotiations dealing with foreign investment. This contributed to the development of investor confidence towards Argentina.

Argentina adopted an investor friendly stance in relation to its international agreements including ratification of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,[88] commitments in the *General Agreement on Trade in Services* (GATS),[89] a pro-foreign investment approach to the *Agreement on Trade Related Investment Measures* (TRIMS),[90] and several regional agreements with MERCOSUR

---

[86] IMF, *The IMF and Argentina, 1991-2001*, [Washington D.C.] International Monetary Fund, Independent Evaluation Office 2004 (C-149, R-207), 11 (footnotes omitted)

[87] In the second half of 2000 more than 70% of private sector deposits and almost 70% of the banking system credit to the private sector were dominated in dollars: Daseking C, Ghosh A, Lane T & Thomas A, *Lessons from the Crisis in Argentina* IMF Occasional Paper No. 236, Washington DC, 2005, 21

[88] Argentina ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) (which is had signed but not ratified in 1958) in 1989 and it entered into force on 12 June 1989.

[89] *General Agreement on Trade in Services* (entered into force January 1995). The commitments undertaken by Argentina in GATS have important implications for the treatment of foreign investment in service activities and indicted a high degree of liberalisation of trade and foreign investment in services by Argentina. See, Bouzas R & Chudnovsky D, above n74, part 4(b)

[90] *Agreement on Trade Related Investment Measures* (TRIMS) (entered into force January 1995). TRIMS established that certain investment measures, such as domestic content requirements, distorted international trade and parties agreed to refrain from imposing such measures on investors.

partners.[91] Argentina was also enthusiastically supportive of the Multilateral Agreement on Investment (MAI) proposed by the Organisation of Economic Cooperation and Development (OECD).[92] Individually these agreements had very little direct impact on foreign investment in Argentina. Collectively, however, they demonstrated the liberal approach to investment and trade adopted by Argentina during this period.

To attract investment in support of its privatisation regime, Argentina also undertook to provide enhanced legal protection to investors. It signed the ICSID Convention on 21 May 1991[93] and became an active signatory of BITs. The first of Argentina's BITs was concluded with the Republic of Italy on 22 May 1990. Today, Argentina is signatory to 56 BITs, nearly all of which were negotiated during the 1990s.[94]

1.3.4 Argentina's bilateral investment treaties

Argentina's BITs provide typical BIT investment protection. As a general rule, they include a broad definition of "investment".[95] Protected investments are granted the right

---

[91] On 26 March 1991 Argentina, Brazil, Uruguay and Paraguay signed the *Treaty of Asuncion* establishing a common market MERCOSUR (Mercado Comun del Sur or Mercosur) 26 March 1991 (entry into force 31 December 1994); 30 ILM 1041 (1991). The purpose of the agreement was to set up a common market and eliminate trade barriers among the signatory parties. Rotman E, *A Guide to MERCOSUR Legal Research: Sources and Documents*, September 2005 at http://www.nyulawglobal.org/Globalex/Mercosur.htm#_edn1 (19 September 2008)

Argentina and its Mercosur partners signed several regional agreements that touch on investment issues: *Buenos Aires Protocol on the Promotion and Protection of Investment Proceeding from Non-Member Countries of the MERCOSUR* (1994) established general principles of treatments for extra-zone investments in order to prevent distortions in investment locations; *Colonia Protocol on the Reciprocal Promotion and Protection of Investments in MERCOSUR* (17 December 1994) aimed at establishing treatment standards for investment from member states; and *The Montevideo Protocol on Trade in Services in the MERCOSUR* (15 December 1997) a regional agreement reflecting the undertakings in GATS. These three regional protocols are void of legal force because they have not yet been ratified by the required number of member state parliaments. Bouzas R & Chudnovsky D, above n74, part 4(c)

[92] The MAI was proposed by the OECD in 1995, efforts to conclude the agreement collapsed in 1998. Bouzas R & Chudnovsky D, above n74, part 3(a)

[93] The ICSID Convention was signed by Argentina's Executive branch on 21 May 1991. It was approved by Congress by Law 24.353 on 28 July 1994, promulgated by the Executive on 22 August 1994 and published in the Official Gazette on 2 September, *Boletin Oficial de la Republica Argentina.*

[94] See Appendix 2 for a table of BITs signed by Argentina

[95] For example the *Bilateral Investment Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments*, signed 14 November 1991, entry into force 20 October 1994, (US-Argentina BIT) defines investment at article 1 to include: (see full text of the US-Argentina BIT at Appendix 4)

to be treated in accordance with certain standards, including fair and equitable treatment[96], "most-favored nation"[97] and "national treatment".[98] BITs signed by Argentina with OECD countries also include an "umbrella" clause that binds the signatories to fulfill any commitment previously made concerning investments by the other party.[99] Argentina's BITs generally contain no restrictions or safeguard clauses regarding the remittance of investment related funds, and expropriation clauses require prompt adequate and effective compensation.[100] The duration of BITs signed by Argentina varies between five and fifteen years, and can be extended.[101]

All BITs signed by Argentina require that paries to a dispute initially seek to resolve that dispute amicably through consultations and negotiations. A time period (between six and eighteen months) must elapse before a dispute can be taken to arbitration. BITs usually refer disputes to international arbitration under ICSID or to alternate forms of arbitration, such as

---

> ... every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:
> ...mortgages...a company or shares of stock or other interests in a company...

[96] For example in the *Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol,* Canberra, 23 August 1995, entry into force 11 January 1997, article 1 provides: "Each Contracting Party shall at all times ensure fair and equitable treatment to investments "

[97] The most favoured nation clause requires that there be no discrimination between BITs signed with other countries. Each state treats all the other states equally as "most-favoured" nations. If a country improves the benefits that it gives to one investor, it has to give the same "best" treatment to all the other investors so that they all remain "most-favored." See above n22

[98] For example in the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments*, London 11 December 1990, entry into force 19 February 1993, article 3 provides:

> (1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third state.
> (2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favorable than that which it accords to its own investors or to investors of any third states.

[99] The clause brings otherwise independent investment agreements under the treaty's umbrella of protection. See above n23. For example in the US-Argentina BIT, article II 2(c) provides: "Each Party shall observe any obligation it may have entered into with regard to investments."

[100] US-Argentina BIT, article IV(1). The full text of the US-Argentina BIT is provided at Appendix 4

[101] Bouzas R & Chudnovsky D, above n74, part 4(d)

the UNCITRAL rules or *ad hoc* arbitration by another institution by mutual consent of the parties.[102]

The influence the mass ratification of BITs by Argentina had on attracting foreign investment to Argentina is impossible to ascertain with any precision. Although foreign investment in Argentina increased markedly during the 1990s, there is no direct correlation between the signature of BITs and the level of foreign investment in Argentina.[103] Many countries that signed BITs with Argentina have not been significant foreign investors in that country. Similarly, there is no BIT in force with Brazil, which is the major Latin American foreign investor in Argentina.[104] Regardless of whether Argentina's framework of BITs actually influenced the decision of whether or not to invest in Argentina, the dispute resolution mechanisms contained in BITs which provided Argentina's consent to ICSID arbitration have become a critical element of foreign investment in Argentina.

1.3.5 Foreign investment in the 1990's

The Menem government opened new prospects for foreign investment in Argentina. The convertibility regime drastically reduced inflation, economic growth was strong and given the depths to which the economy had fallen in the 1980s, the rebound was initially spectacular. The Argentine economy grew on average 6.7 percent per annum between 1991 and 1997,[105] and Argentina entered a period of healthy export and investment-led growth.[106]

Menem's de-regulation of foreign investment meant there were no approvals, formalities or registrations required for foreign investment in Argentina. Nor were investors subject

---

[102] US-Argentina BIT, article VII. The full text of the US-Argentina BIT is provided at Appendix 4

[103] Bouzas R & Chudnovsky D, above n74, part 2(b)

[104] Ibid.

[105] Hausmann R & Velasco A, "Hard Money's Soft Underbelly: Understanding the Argentine Crisis" (2002) *Brookings Trade Forum*, 59

[106] IMF, *The IMF and Argentina, 1991-2001,* [Washington D.C.] International Monetary Fund, Independent Evaluation Office 2004 (C-149, R-207), 11

to any discriminatory withholding taxes on incomes or profits. These structural reforms, together with an abundance of natural resources, the size and growth of the domestic market, privatisation, price stabilization and trade liberalization, created a foreign investment-friendly environment in Argentina. [107]

The 1990s saw large capital inflows in the form of foreign investment and Argentina emerged as one of the highest developing country recipients of foreign investment.[108] Argentina sold its oil and telecommunications monopolies; several electrical, gas and water companies; the state airlines; television stations; roads; railway lines; steel and petrochemical firms; grain elevators; hotels; and even racetracks. Foreign investment was predominately from the United States and Spain while other important investors were from France, Italy, the Netherlands, Germany and the United Kingdom. The majority of the top ten companies in Argentina were under foreign ownership[109] and, in the opinion of some, "Mr Menem privatised almost everything the state owned".[110] From an annual average of approximately US$650 million in 1984-89, net inward foreign investment increased to US$3.6 billion in 1992-94, US$8.2 billion in 1997-98[111] and to a peak of more than US$23 billion in 1999.[112]

Argentina became a poster child for privatisation during the 1990s and between 1991 and 1997 the Argentine economy outperformed that of most other countries in Latin America.[113] The international financial community, including the IMF, the World Bank and the Inter American Bank for Development, applauded its performance. An example of this recognition was President Menem's appearance alongside President Clinton at the

---

[107] Bouzas R & Chudnovsky D, above n74, part 1

[108] Chudnovsky D & Lopez A, above n70, 8

[109] Powell A, "Argentina's Avoidable Crisis: Bad Luck, Bad Economics, Bad Politics, Bad Advice" (2002) *Brookings Trade Forum*, 3

[110] "A decline without parallel" *The Economist*, Feb 28 2002

[111] Bouzas R & Chudnovsky D, above n74, part 2

[112] Chudnovsky D & Lopez A, above n70, 8

[113] Hausmann R & Velasco A, above n105, 59

1999 annual meetings of the IMF and the World Bank.[114] By the end of the decade, privatisation and convertibility were viewed as the solution to Argentina's precarious economic situation.[115] In October 1998 the IMF Managing Director remarked:

> Argentina has a story to tell the world: a story which is about the importance of fiscal discipline, of structural change, and of monetary policy rigorously maintained.[116]

The story Argentina would go on to tell, however, was not that alluded to by the IMF Managing Director. Instead Argentina was heading towards what has been described as "one of the worst economic crises in its history"[117] and "among the most severe of recent economic crises worldwide".[118]

1.3.6 Economic slowdown and downturn 1998-2000

Towards the end of 1998 foreign investment began to decline and Argentina's economy entered into a period of recession. The downturn was triggered by a variety of factors, some external to Argentina and others directly related to its political and economic choices. Once the downturn started, Argentina was unable to turn its economy around.[119]

---

[114] Krueger A, "Crisis Prevention and Resolution: Lessons from Argentina" speech from *The Argentina Crisis:* National Bureau Of Economic Research (NBER) Cambridge, July 17, 2002

[115] Johnson A, "Evaluating privatization of Telecommunications to Foster Economic Growth: Argentina Revisited" (2003) 36(4) *Law Technology Washington* 3

[116] IMF, *The IMF and Argentina, 1991-2001,* [Washington D.C.] International Monetary Fund, Independent Evaluation Office 2004 (C-149, R-207), 12

[117] Daseking C, Ghosh A, Lane T, & Thomas A, above n87, 1

[118] IMF, *The IMF and Argentina, 1991-2001,* [Washington D.C.] International Monetary Fund, Independent Evaluation Office 2004 (C-149, R-207), 8

[119] Debate on the causes of the Argentine Crisis is substantial and goes beyond the limits of this thesis. Expert opinion is divided and economists and other policy experts provide for a multidimensional mix of conflicts, actors and measures. See generally Hausmann, R & Velasco A, "Hard Money's Soft Underbelly: Understanding the Argentine Crisis" (2002) *Brookings Trade Forum*; Powell A, "Argentina's Avoidable Crisis: Bad Luck, Bad Economics, Bad Politics, Bad Advice" (2002) *Brookings Trade Forum*; Blustein P, *And the money kept rolling in (and out). Wall Street, the IMF, and the bankrupting of Argentina* Public Affairs, 2005; International Monetary Fund, Policy Development and Review Department *Lessons from the Crisis in Argentina* October 8, 2003; Bouzas R & Chudnovsky D, *Foreign Direct Investment and Sustainable Development. The Recent Argentina Experience* Universidad de San Andrés Victoria (Argentina) 2005; Chudnovsky D & Lopez A, *Foreign Investment and Sustainable Development in Argentina* Working Group on Development and Environment in the Americas, Discussion Paper Number 12, April 2008, at http://ase.tufts.edu/gdae/Pubs/rp/DP12Chudnovsky_LopezApr08.pdf (15 September 2008)

Convertibility had lowered inflation and stabilized the economy. The fixed exchange rate made imports cheap, producing a constant flight of dollars away from the country and a progressive loss of Argentina's industrial infrastructure, which led to an increase in unemployment. The Russian crisis in August 1998 brought about a reversal in capital flows from emerging markets and significantly affected Argentina.[120] A decline in trade, in particular the weakening of demand in Brazil (Argentina's largest trade partner) and the strengthening United States dollar, also impacted heavily on Argentina. The pegging of the peso to the US dollar affected Argentina's competitiveness in export markets to both Europe (Argentina's second largest market after Brazil) and with other countries exporting to the United States (Argentina's third largest importer).[121] Government spending was high and Argentina's public debt grew enormously during the 1990s. Although the country showed no signs of being able to pay, the IMF kept lending money to Argentina and postponing its payment schedules.

Some argue that the downturn was a cyclical correction, due to the fact that the economy had been running above potential, not least due to a significantly overvalued peso.[122] Heightened political uncertainty[123] and concerns over Argentina's public debt were also important factors. The continued appreciation of the US dollar, a further decline of investment in emerging capital markets and Argentina's public debt intensified Argentina's problems in 2000.[124] These were exacerbated by the restrictions on fiscal policy open to the government in light of the convertibility regime.

---

[120] Powell A, above n109, 3

[121] Ibid.

[122] IMF, Policy Development and Review Department *Lessons from the Crisis in Argentina* 8 October 2003, 37

[123] Although Menem had brought some political stability, the situation became uncertain in 1998 with his attempts to remain in power for an unprecedented third term, despite widespread opposition; IMF, Policy Development and Review Department *Lessons from the Crisis in Argentina* 8 October 2003, 40

[124] IMF, *The IMF and Argentina, 1991-2001,* [Washington D.C.] International Monetary Fund, Independent Evaluation Office 2004 (C-149, R-207), 12

1.3.7 The deterioration of the economic climate in 2001

By 2001 the political, economic and social elements had taken a turn for the worst. Argentina's crisis deepened in 2001 and authorities took a series of measures to correct the slide: (1) improvements in tax enforcement and the introduction of exemptions; (2) an equally weighed basket of the dollar and the euro; (3) an exchange of outstanding bonds totalling US$30 billion for longer maturity instruments; and (4) increased competition plans in domestic markets. These plans were introduced together with an increase in IMF funding to Argentina.

The measures did not yield the expected results, and attempts at strengthening public finances failed to break the cycle of raising interest rates, failing growth and fiscal underperformance.[125] Moreover, market confidence was further damaged and doubts about the sustainability of public debt and convertibility strengthened.[126] Despite IMF assistance, the general economic situation in Argentina deteriorated. Gross Domestic Product (GDP) declined 4.5 per cent in 2001 and unemployment rose to 18.3 per cent.[127] Economic indicators were accompanied by significant social problems, and by December 2001 almost half the population was living below the poverty line.[128]

1.3.8 Argentina responds to the crisis

As poverty and unemployment soared, consumer confidence failed and savings were massively withdrawn from banks.[129] The government's first response in a series of

---

[125] IMF, Policy Development and Review Department *Lessons from the Crisis in Argentina* 8 October 2003, 59

[126] Ibid, 35

[127] Ibid, 37

[128] Blustein P, *And the money kept rolling in (and out). Wall Street, the IMF, and the bankrupting of Argentina* Public Affairs, New York, 2005, 2

[129] Private sector deposits fell by more than $3.6 million (6 percent of the deposit base) during November 28-30. See, Daseking C, Ghosh A, Lane T, & Thomas A, above n87, 21

measures was to issue a bank deposit freeze known as "*corralito*".[130] *Corralito* was aimed at preserving the stability of the banking system; it worked by restricting bank withdrawals to 250 pesos per week and prohibiting the transfer of currency abroad.

Public discontent was clear, with public demonstrations across the country including the banging of pots and pans, looting shops and vandalising government buildings, banks and foreign owned companies. Confrontations between the police and citizens were common, and fires were regularly lit on Buenos Aires avenues. The demonstrations resulted in the death of more than two dozen people.[131] On 7 December 2001, Argentina announced that it could not guarantee payment of foreign debt, thereby evidencing Argentina's de facto default.[132]

In the midst of mass riots, looting and demonstrations the current President de La Rua and his cabinet were forced to resign. This resignation was followed by the infamous succession of five presidents taking office over ten days, ending on 1 January 2002 when Eduardo Duhalde was made president.

On 6 January 2002 Duhalde introduced the *Public Emergency and Reform to the Provisions about Exchange Rate Law*[133] (hereinafter the "Emergency Law"). The law declared a public emergency as regards: social; economic; administrative; financial; and foreign exchange market affairs. The Emergency Law ended convertibility, thus ending the one-for-one peg of the Argentine peso to the United States dollar. It also provided for the switch from dollars to pesos of debts owed to the banking system, debts arising from management contracts governed by public law and debts under private agreements. The law further provided for the renegotiation of private and public agreements to reflect the

---

[130] Financial Entities Decree 1570/01 on 1 December 2001, *Boletin Oficial de la Republica Argentina*, 29787, 3 December 2001; *Corralito* is the diminutive form of "corral", which means an animal pen or enclosure. The diminutive is used to refer to a "small enclosure" and refers to the restrictions imposed by the measure.

[131] Blustein P, above n128, 1

[132] Horebeck J F, *The Argentine Financial Crisis: A Chronology of Events* CSRS Report for Congress, RS21130, January 2002

[133] *Public Emergency and Reform to the Provisions about Exchange Rate,* Law No. 25.561 of 06 January 2002, *Boletin Oficial de la Republica Argentina,* 07 January 2002

end of convertibility. This all-encompassing switch into Argentine pesos was called "pesification" and it affected the entire Argentine economy. A further set of measures adopted under the Emergency Law acknowledged and formalized the default of Argentina on its internal and external debt, and provided subsequently for that debt's restructuring with the aim of progressively restoring normal economic conditions.[134]

The crisis was characterized by severe deflation and a deterioration of the economy. It also led to severe social hardship: unemployment rose to above 25 percent and in 2002 more than 50 percent of Argentines were living below the poverty line.[135] Moreover, the financial impact was not limited to Argentina. Also affected were foreign companies that had invested in Argentina during the 1990s. Investors had been attracted to the regulatory framework in Argentina which granted long-term licenses and tariffs calculated in US dollars. In the wake of the crisis, tariff adjustments were temporarily suspended before being restructured into pesos. This caused foreign investors to suffer considerable un-indemnified losses.

1.4 The Argentine Cases

To seek compensation for losses suffered, foreign investors turned to the BITs their home states had signed with Argentina during the 1990s. Relying on the dispute resolution provisions of those BITs, which referred disputes to ICSID, investors instituted proceedings against Argentina for expropriation of investments and violation of BIT obligations.

Each of the Argentine Cases has its own individual characteristics, including the parties, relevant treaties, the terms of the individual commercial contracts and the regulatory framework of the industry to which the investment relates. Each case therefore raises its own special issues and particular considerations. Yet as the Argentine Cases arise from

[134] Ibid

[135] Blustein P, above n128, 2

the same crisis, and the claims by investors are for breaches of similar BIT provisions, the cases provide a significant contribution to the development of ICSID jurisprudence.

1.4.1 The claims

Except for a handful of cases, the Argentine Cases have been instituted by investors in the public utility sector (oil, gas, electricity, water, transportation and telecommunications).[136] Investment returns were tied to tariffs that were substantially reduced by the devaluation, the adjustment of which was prevented by the government in its measures to respond to the crisis. This, and various other administrative and financial measures adopted by the government, adversely impacted on investors. Investors claimed breaches for alleged violations of some of the most substantive BIT provisions, including: the direct and indirect expropriation of the investment; failure to treat investment in accordance with the standard of fair and equitable treatment; failure to observe obligations entered into in regard to the investment in breach of umbrella clauses; and discriminatory treatment of the investor.

The claims centre on losses incurred by investors due to some or all of the following measures adopted by Argentina:

- *Corralito* – the measures that blocked deposits (temporary bank freeze) severely curtailing the right to withdraw money;

- The official ban on the transfer of funds abroad and their exchange in freely convertible and transferable currencies;

---

[136] Exceptions are a number of cases relating to the finance, insurance and leasing sectors: *Continental Casualty Co v The Argentine Republic* ICSID Case No ARB/03/9; *CIT Group Inc v The Argentine Republic* ICSID Case No ARB/04/9; *RGA Reinsurance Company v The Argentine Republic* ICSID Case No ARB/04/20; *Daimler Chrysler services AG v The Argentine Republic* ICSID Case No ARB05/1; *Asset Recovery Trust SA v The Argentine Republic* ICSID Case No ARB/05/11. A case concerning the production and sale of public transportation vehicles: *Metalpar S A. and Buen Aire S.A v Argentine Republic* ICSID Case No ARB/03/5. A case concerning the development of information storage of the judiciary: *Unysis Corp v Argentine Republic* ICSID Case No ARB/03/27 While not tied to a tariff regime the claims in these cases still respond to the measures adopted by Argentina in response to the economic crisis of 2000-2001.

- *Pesification* – the mandatory conversion of dollar-denominated bank deposits, contracts, public utility rates and private or governmental debt into Argentine pesos;[137]

- Measures that rescheduled term deposits and reduced interest rates;

- The suspension of adjustment clauses indexing the US Producer Price Index ("PPI"), leading to a loss in the value of investments;

- Loss of ability to pay debt – ability to pay debt has been reduced as the investor's debt was generally dominated in dollars;

- Losses incurred due to dollar dominated operating costs; and

- Default on and unilateral rescheduling of governmental debt.

Argentina denies that it has violated BIT obligations on the grounds that: the challenged measures were across-the-board; no difference was made between domestic and foreign investors; and none of the challenged policy measures interfered with ownership rights of investors. It maintains that the abandonment of the currency board and the policy measures that followed, including the suspension of adjustment clauses indexed to US PPI and pesification, were necessary and protected under the emergency clause of relevant BITs. Alternatively, Argentina argues that its measures were in response to a "state of necessity" and thus excused from liability under BITs and customary international law. The catalyst for the state of necessity, it is argued, was one of the deepest economic crises in history, and that maintaining the currency board would have increased the already peaking poverty rates in the country. It also argues that public

[137] Decree 214 of 3 February, Decree 471 of 8 March, Decree 644 of 18 April 2002

utility firms took investment and financial decisions as part of their regular business operations, the consequences of which cannot be shifted onto the public sector.[138]

1.4.2 The awards

To date all of the Argentine Cases, except one have found Argentina liable to some extent for breach of BIT obligations.[139] The details of the substantive holdings of the awards are not essential to this thesis but for completeness they are briefly summarized below.

a) Expropriation

Investors have alleged expropriation of investments by Argentina.[140] This allegation has been consistently rejected by tribunals in the Argentine Cases.[141] The claim of expropriation raises two main inquiries: whether a regulation results in expropriation and, if so, the lawfulness of the expropriation. This involves balancing two competing interests: the degree of the measure's interference with the right of ownership, and the power of the State to adopt its policies. The awards have concluded that the effect of Argentina's actions had not been permanent on the value of the claimants' shares and that investment had not ceased to exist. Without a permanent, severe deprivation of rights with regard to its investment, or almost complete deprivation of the value of investment, there is no expropriation.[142] For example, the *Sempra Award* held that for a claim of indirect

---

[138] Bouzas R & Chudnovsky D, above n74, part 5(b)

[139] See Appendix 1 for the details of the Argentine Cases

[140] See the US-Argentina BIT, article IV, the full text of the US-Argentina BIT is provided at Appendix 4. The US-Argentina BIT is relevant BIT in all but one of the Argentine Cases decided to date. The other is the *Treaty between the Argentine Republic and the Republic of Chile on the Promotion and Reciprocal Protection of Investments* of 1991 (Chile- Argentina BIT) relevant to *Metalpar S A. and Buen Aire S A v Argentine Republic,* ICSID Case No ARB/03/5 (hereinafter *Metalpar Award*)

[141] Two awards involving Argentina have held Argentina to have expropriated investments. These proceedings related to events before the Argentine Crisis and are outside the analysis of this thesis. See, *Siemens v Argentine Republic* ICSID Case No ARB/02/08, *Compania de Aguas del Aconquija S A and Vivendi Universal v Argentine Republic* ICSID Case No ARB/97/3

[142] *LG&E Award* par 200; *Sempra Energy International v Argentine Republic* ICSID Case No ARB/02/16 (hereinafter *Sempra Award*) pars 283-285; *Enron Corporation and Ponderosa Assets, P.L v Argentine Republic* ICSID Case No ARB/01/3 (hereinafter *Enron Award*) par 246; *CMS Award* par 264; *Metalpar Award* pars 173-174

expropriation to succeed it would require that "the investor no longer be in control of its business operation, or that the value of the business has been virtually annihilated".[143]

b) Breach of the "Umbrella Clause"

Umbrella clauses work by bringing other investment agreements between the parties under the protection of a BIT. The umbrella clause in the US-Argentine BIT provides:

> Each Party shall observe any obligation it may have entered into with regard to investments.[144]

All tribunals have found Argentina in violation of this provision. The *Enron* and *LG&E Awards* held that the ordinary meaning of the phrase "any obligation" included both contractual obligations and statutory obligations undertaken with regard to investments.[145] The approach in the *Sempra Award* distinguished between ordinary commercial breaches of contract and treaty breaches, implying that only the latter would fall under the scope of an umbrella clause. This distinction, it claimed, is necessary to avoid "an indefinite and unjustified extension of the umbrella clause".[146] The tribunal's slightly divergent approaches proved immaterial, because Argentina's measures were not ordinary contractual breaches but the product of major legal and regulatory changes introduced by the state. The Argentine Cases have held that this change of policy was not envisaged by the legal framework governing the investments and violated obligations entered into with regard to investments.[147]

---

[143] *Sempra Award* pars 283-285

[144] US-Argentina BIT, article II(2)(c), the full text of the US-Argentina BIT is provided at Appendix 4

[145] *Enron Award* par 274; *LG&E Award* par 170

[146] *Sempra Award* par 310

[147] *Sempra Award* par 311- 314; *CMS Award* par 303; *LG&E Award* par 175; *Enron Award* par 277; *Sempra Award* par 314; there was no umbrella clause in issue in *Metalpar S.A and Buen Aire S A. v Argentine Republic* ICSID Case No ARB/03/5. The *CMS Award* finding in relation to the umbrella clause was annulled by the *ad hoc* annulment committee. See below 3.5.3

c) Fair and equitable treatment

The application of the fair and equitable treatment standard required under article II(2)(a) of the US-Argentine BIT has established Argentina's liability in four of the five decided Argentine Cases.[148] The provision states that "[i]nvestment shall at all times be accorded fair and equitable treatment".[149] The consideration of this standard by tribunals in the Argentine Cases has emphasized the relevance of the host state's obligation to maintain a stable and predictable legal and business environment in line with the investor's legitimate expectations. The *CMS Award* explained the balance sought by this provision as follows:

> There can be no doubt... that a stable legal and business environment is an essential element of fair and equitable treatment.[150]...
>
> It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.[151]

Consistent with this approach, the *LG&E Award* affirmed that the fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor. [152] This approach was reflected in the awards in the remaining cases.[153]

---

[148] *CMS Award* par 281; *LG&E Award* par 132; *Enron Award* par 268; *Sempra Award* 304; The tribunal in the *Metalpar Award* agreed with the reasoning in the *LG&E Award* but distinguished it and the *Enron Award* because in this case which involved two Chilean companies there was no bid, license, permit or contract of any kind between Argentina and the claimant and thus no legitimate expectations were entertained by the claimant to be breached by Argentina. See, *Metalpar Award* par 187

[149] US-Argentina BIT, article II(2)(a), the full text of the US-Argentina BIT is provided at Appendix 4

[150] *CMS Award* par 274

[151] *CMS Award* par 277

[152] *LG&E Award* par 133

[153] *Enron Award* par 267; *Sempra Award* par 303; *Metalpur Award* par 184

1.5 Conclusion

The Argentine Cases provide a striking example of multiple proceedings emerging from the same set of facts. The cases are based on BIT provisions common to the majority of BITs internationally, and the claims for protection in the Argentine Cases could be repeated in any number of states and circumstances. For this reason the international community will carefully watch the outcome of the Argentine Cases and determine what influence they will have on ICSID. A consistent approach by tribunals in the Argentine Cases to substantive BIT protection will foster certainty for parties. Unfortunately, a full analysis of the awards to date, demonstrates that this has not occurred. In contrast to the consistency demonstrated in the tribunal's consideration of investor's claims, the next chapter examines the tribunals' treatment of Argentina's defence of necessity, which has been addressed divergently and randomly.

Chapter 2

Inconsistent Interpretations of Argentina's Defence

2.1 Introduction

A key element of the Argentine Cases is Argentina's defence of necessity. Argentina has argued that its actions during the economic crisis were implemented under a state of emergency, and has claimed a defence of necessity under the relevant BITs and customary international law. The first award in the Argentine Cases, *CMS v Argentina*, rejected Argentina's plea of necessity under both the BIT and customary international law. This approach was followed in two subsequent awards. Eighteen months after the *CMS Award*, in a case with virtually identical facts, the tribunal in *LG&E v Argentina* handed down a diametrically opposed decision and held that a temporary state of necessity was established under the BIT. The tribunal in *LG&E v Argentina* also recognised the satisfaction of the defence at customary international law in support of its findings.

The significant divergence in the tribunal's consideration of these defences had a significant impact on the outcome of each case and merits closer analysis. Inconsistent awards question the legitimacy of ICSID arbitration and undermine confidence in ICSID tribunals to accurately resolve disputes.

The analysis in this chapter centres on the *CMS* and *LG&E Awards*. The conflicting consideration of Argentina's defence under the BIT (hereinafter the "Treaty Defence") principally arises from a failure to consider the relationship between the different sources of international law and the general principles for their interpretation and application. This chapter sets out these general principles, before comparing and contrasting the Treaty Defence as considered by the tribunals in the *CMS* and *LG&E Awards*. An analysis of the tribunals' approaches to the defence of necessity at customary international law will then be undertaken.

2.1.1 CMS Gas Transmission Company v The Argentine Republic

A major sector subject to Argentina's privatisation regime was the gas industry. Within the legal framework enacted to govern this sector,[1] Transportadora de Gas del Norte ("TGN"), an Argentine incorporated company, obtained a licence to transport gas. Blocks of state-owned shares in TGN were sold to private investors. CMS, a US company, became a 29.42% shareholder in TGN. According to enabling legislation and a licence issued by the government, the tariffs of the contract were to be recouped in US dollars, adjusted periodically according to the US Producer Price Index ("PPI") and converted into pesos at the time of billing.

The economic crisis in Argentina precipitated a variety of measures by the Argentine government. Through emergency legislation the government limited the capacity of depositors to withdraw funds, abolished convertibility and no longer calculated tariffs in US dollar adjusted to the US PPI. CMS alleged that the measures adopted by Argentina during the 2001 crisis caused it loss of income and the ability to pay debts denominated in US dollars. CMS alleged that Argentina's suspension of TGN's tariff adjustment, and Argentina's emergency law which altered the regime under which TGN's tariffs were calculated in US dollars and converted into pesos, violated the US-Argentina BIT. CMS claimed that Argentina violated the US-Argentina BIT by expropriating CMS's shares without compensation, by failing to treat its investment fairly and equitably, by acting in a discriminatory and arbitrary manner, and by failing to observe licence obligations regarding CMS's investment as required under the BIT's umbrella clause.

The tribunal rejected CMS's claims of expropriation and discriminatory and arbitrary treatment. However, it held that Argentina had violated the fair and equitable treatment

---

[1] Instruments included the 1992 Gas Law (Law 24.076 of 7 June 1991 on the Regulation of Natural Gas, *Boletin Oficial de la Republica Argentina*, 12 June 1992); the Gas Decrees (Decree 1738/92 of 18 September 1992, *Boletin Oficial de la Republica Argentina*, 28 September 1992; Decree 2255/92 of 2 December 1992, *Boletin Oficial de la Republica Argentina*, 7 December 1992); Information Memorandum on the Initial Public Tender Offer 1993

standard and the umbrella clause in the US-Argentina BIT, and awarded US$133.2 million plus interest to CMS.

Following an annulment application by Argentina, the *ad hoc* committee annulled the tribunal's findings of liability for breach of the umbrella clause on the grounds that the tribunal failed to state the reasons for its decision. This decision had no material affect on the damages payable under the award as damages were awarded by the tribunal on alternate grounds.

2.1.2 LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc. v The Argentine Republic

The claimants, three US-based corporate investors, invested in Argentina's newly privatised natural gas market in the 1990s by purchasing stakes in gas distribution companies. Argentina guaranteed that gas tariffs would be calculated in US dollars, adjusted regularly to cover costs and provide a reasonable rate of return, and would not be subject to price controls without compensation. The claimants alleged that measures adopted during the Argentine crisis interfered with their investments in violation of the US-Argentina BIT. These measures included: freezing tariff adjustments; calculating tariffs in Argentine pesos instead of dollars; and mandating the renegotiation of gas distribution licenses under the threat of rescission.

The tribunal held that Argentina's acts were not arbitrary under the BIT, nor did they amount to expropriation. It held that Argentina had breached the fair and equitable treatment standard in the BIT, and that its abrogation of certain contractual undertakings gave rise to liability under the umbrella clause. Importantly, the tribunal excused Argentina from compliance with BIT obligations for a 17 month period on the basis that it established a state of necessity under article XI of the US-Argentina BIT. Argentina was, however, held liable for damages related to violations of the US-Argentina BIT occurring outside the 17 month period, and the tribunal awarded damages in the amount of US$57.4 million including interest.

2.2 Different Sources of International Law

2.2.1 Applying international law to ICSID arbitration

Article 42(1) of the ICSID Convention allows parties to a dispute to choose the law applicable to the substance of an arbitration administered by ICSID.[2] Where there is no agreement between the parties, tribunals are governed by the second sentence of article 42(1):

> ...[I]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Debate has surrounded the interpretation of article 42(1) and what it means in regard to the application of international law. Interpretations range from a restricted application of international law in a complementary or corrective role[3] to a role that calls for the application of international law to safeguard the principles of *jus cogens*.[4] Recently ICSID tribunals have adopted a flexible approach, evidenced in the leading statement by the annulment committee in *Wena Hotels Limited v Arab Republic of Egypt*,[5] which interprets article 42(1) as allowing for the application of both domestic law and international law depending on the facts of the case:

> What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.[6]

---

[2] ICSID Convention, article 42(1):

> The tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.

[3] Gaillard E & Banifatemi Y, "The meaning of "and" in Article 42(1), Second Sentence of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process" (2003)18 *ICSID Review- FILJ* 357, 389 & 393

[4] *CMS Award* par 115

[5] *Wena Hotels Limited v Arab Republic of Egypt* ICSID Case No ARB/98/4 (Decision on Annulment), 41 ILM 933 (2002) (*Wena v Egypt*)

[6] *Wena v Egypt* par 941

Although simple in form, this interpretation essentially allows for the application of any international law rule considered relevant. It provides no tools for determining how or why a certain rule applies over another, neither in determining the priority between different sources of international law, nor in determining how the complex web of international law rules are to be applied.

2.2.2 Prioritising between different sources of international law

The *Statute of the International Court of Justice*[7] is regarded as the appropriate starting point for assessing the applicable source of international law.[8] Article 38(1) reads:

> 1. The court whose function it is to decide a matter in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

A treaty is an express agreement between parties and creates a binding obligation on its parties. Where states are party to a treaty which expressly regulates the issues of a dispute between them, the treaty provides the primary source of applicable law and articulates the legal obligations between them.[9] The obligation to abide by a treaty stems from the principle *pacta sunt servanda* (pacts must be respected), and entitles states to require that obligations be respected and to rely upon those obligations being complied with.[10] The

---

[7] *Statute of the International Court of Justice* 1945 (entered into force 24 October 1945) 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945)

[8] Triggs G D, *International Law: Contemporary Principles and Practices*, Lexis Nexis, Butterworths, Australia, 2006, 4. This approach has been evidenced by cases in the International Court of Justice, *ad hoc* War Crimes tribunals and arbitral bodies.

[9] Ibid, 496; Shaw M, *International Law*, 5th edition, Cambridge University Press, Cambridge, 2003, 84

[10] *Nuclear Tests Cases*, ICJ Reports, 1974 at 253, 668 cited in Shaw M, above n9, 811; Thirlway H, "The Sources of International Law" in Evans M D (ed), *International Law*, 2nd Edition, Oxford University Press, Oxford, 2006,119

rule of *pacta sunt servanda* is reaffirmed at article 26 of the *Vienna Convention on the Law of Treaties* (Vienna Convention).[11]

2.2.3 Lex specialis

Where there are several rules potentially applicable to a dispute or question of law, but there are specific rules governing a particular issue, the maxim *lex specialis derogat legi generali* (hereinafter *lex specialis*) requires that the more specific rule prevails over a general rule.[12] Treaty rules between states as *lex specialis* have priority over general rules of customary international law between the states.[13] That a specific law, such as a treaty rule, has priority over customary law is justified by the fact that such a law, being more concrete, often takes better account of the particular features of the context in which it is being applied, and may often better reflect the intent of the parties subject to the law.[14] This allows a state to derogate from customary law by concluding a treaty with different obligations.[15] The leading application of this principle is articulated in the *North Sea Continental Shelf Cases*:

> The first question to be considered is whether the 1958 Geneva Convention on the Continental Shelf is binding on all Parties in this case...Clearly if this is so then the provisions of the Convention will prevail in the relations between parties and would take precedence of any rules having a more general character, or derived from another source. On that basis the Court's reply to the question put to it...would necessarily be to the effect that as between the Parties the relevant provisions of the Convention represented

---

[11] *Vienna Convention on the Law of Treaties* 1969 (entered into force 27 January 1980) UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969)). Argentina is party to the Vienna Convention, its accession to the Convention was approved by Law 19865 of 10 March 1972 (signed by Argentina on 23 May 1969), *Boletin Oficial de la Republica de Argentina*, 11 January 1973

[12] Shaw M, above n9, 116; International Law Commission, "Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", A/CN.4/L702, 18 July 2006, *Yearbook of the International Law Commission*, Vol. II, Part Two, 2006 at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf

[13] *Tunisia/Libya Continental Shelf Case*, ICJ Reports, 1982; 67 ILR 4 par 31; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Merits, Judgment, ICJ Reports (1986) at 3, 137; 76 ILR at 349, 471 cited in Shaw M, above n9, 116

[14] International Law Commission, above n12, par 7

[15] Malanczuk P & Akehurst M B, *Akehurst's Modern Introduction to International Law*, 7th Rev. Edition, Routledge, London, 1997, 57

> the applicable rules of law- that is to say constituted the law for the Parties- and its sole remaining task would be to interpret those provisions in so far as their meaning was disputed or appeared uncertain, and to apply them to the particular circumstances involved. [16]

A treaty has priority over general principles of international law. However, it does not exist in isolation from international law. The clearest example is that states cannot provide for a treaty which authorises acts contrary to *jus cogens.*[17] Importantly, rules of international law are also used to interpret treaties constituting a *lex specialis.* The guiding principles of treaty interpretation are those set by the template of articles 31 and 32 the Vienna Convention,[18] which are accepted as reflecting the customary international

---

[16] *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands*) ICJ Reports 1969, 3 at 24; 41 ILR 29

[17] Vienna Convention, article 53 provides:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[18] Vienna Convention:

> Article 31 *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32 *Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of
>
> the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the

law principles of treaty interpretation.[19] The very structure of articles 31 and 32 of the Vienna Convention places the treaty text at the centre of any treaty interpretation. Article 31(3)(c) of the Convention allows for "other rules of international law applicable in the relations between the parties" to be taken into account when interpreting a treaty. It is important to recognise, though, that these rules do not exist as overriding principles, as this is a role reserved for principles of *jus cogens.*[20]

2.2.4 Separation of sources

The principle of *lex specialis* serves to prioritise between legal obligations but it does not substitute or render obsolete other sources of law. The principle of separation of sources in well established in *Military and Paramilitary Activities in and against Nicaragua*:

> ...even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain separate existence. [21]

This means that where a defence is available under treaty and customary international law, the treaty takes priority as *lex specialis*, but the defence at customary international law maintains its existence as an independent defence to liability and requires separate consideration by the tribunal.[22]

---

application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

[19] *Indonesia/Malaysia Case,* ICJ Reports, 2002 at 37; *Libya/Chad Case,* ICJ Reports, 1994 at 6, 21-2; 100 ILR at 1, 20-1 cited in Shaw M, above n9, 839

[20] McLachlan C, "Investment Treaties and General International Law" (2008) 57 *International and Comparative Law Quarterly* 361, 373

[21] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) Merits, Judgment, ICJ Reports, 1986 par 95

[22] Where customary international law provides for a stricter test than the treaty there is often no need for a separate resort to custom.

2.3 Argentina's Defence under Treaty and at Customary International Law

Argentina's central defence for breaches of its treaty obligations in the Argentine Cases is that the political, social and economic crisis it suffered at the relevant time allowed it to take action contrary to its obligations, as such measures were implemented under a state of necessity.[23] The defence is pleaded on two separate grounds: under the relevant BIT clauses, and under customary international law.

The *CMS Award* held that Argentina was unable to establish the defence of necessity either under the treaty, or under the principles of customary international law. In contrast, the *LG&E Award* held that Argentina was able to establish the Treaty Defence, and that the establishment of the customary international law defence supported this conclusion. The conflict in the interpretation and application of these defences is more surprising when one considers the overlap of arbitrators and witnesses in each case. ICJ Judge Fransisco Rezek served as Argentina's appointed arbitrator in both cases and the tribunals in both proceedings heard submissions on the issue in question by the same expert witnesses.[24]

2.3.1 Interrelationship between treaty and customary international law

In order to address the defence of necessity, under treaty and at customary international law, a tribunal must first consider how these sources of international law interrelate to each other and how this affects their application to the dispute. The Treaty Defence

[23] *LG&E Award* pars 201-203; *CMS Award* pars 304-308

[24] Former ICJ Judge Fransisco Rezek served as Argentina's appointed arbitrator in both proceedings Jose Alvarez, Ann-Marie Slaughter, William Burke-White and Noureil Roubini all submitted expert opinions on necessity before both tribunals. This overlap of arbitrators is not limited to the *CMS* and *LG&E Awards*; tribunals in the Argentine Cases to date are: *CMS Award*, Francisco Orrego Vicuna, The honourable Marc Lalonde P C., O.C., Q.C., H.E. Judge Francisco Rezek, *Enron Award*, Francisco Orrego Vicuna, Albert Jan Van den Berg and Pierre Yves Tschanz. *Sempra Award*, Francisco Orrego Vicuna, The honourable Marc Lalonde P.C., O.C., Q.C. and Dr. Sandra Morelli Rico, *LG&E Award*, Tatiana de Maekelt, H.E. Judge Francisco Rezek and Albert Jan Van den Berg.

relevant to the *CMS* and *LG&E* proceedings is provided at Article XI of the US-Argentina BIT:

> This Treaty shall not preclude the application by either Party of the measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own security interests. [25]

Article 25 of the *Draft Articles on Responsibility of States for Intentionally Wrongful Acts*[26] (ILC Articles) is widely recognised as reflecting the defence of necessity at customary international law.[27] Article 25 provides:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: is the only way for the State to safeguard an essential interest against a grave and imminent peril; and does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole;
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> a) the international obligation in question excludes the possibility of invoking necessity: or
>
> b) the State has contributed to the situation of necessity.

The defences are found in different sources of law, one is from treaty and the other is a principle of customary international law. They have a different operation and content. The customary international law defence provides an excuse for breaching an obligation at international law and removes liability after the fact, whereas the Treaty Defence is a threshold requirement which provides that if measures are "necessary" then other

---

[25] The US-Argentina BIT is relevant to the *CMS, LG&E, Sempra* and *Enron Awards* Article XX of the Belgium-Luxembourg Economic Union-Argentina Bilateral Investment Treaty (August 26, 1992) was relied on in a similar manner in *Camuzzi International S.A v Argentina* ARB/03/7 (2005). See Appendix 1 for the relevant BITs in the Argentine Cases

[26] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts,* Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess. Supp. No. 10, at par. 43, UN Doc. A/56/10 (2001) (ILC Articles)

[27] *Gabcíkovo-Nagymaros Project Case* (Hungary/ Slovakia), Judgment, 25 September 1997, [1997] ICJ Reports 7 pars 51-52: "The Court considers... that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation." See also, *Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, [2004] ICJ Rep. 136, par 140. This position was accepted in both the *CMS Award* par 315 and *LG&E Award* par 245

obligations under the treaty do not apply.[28] The Treaty Defence is unqualified and allows states the freedom to take measures necessary for the maintenance of public order or the protection of its own security interests. In contrast, the customary international law defence operates on very narrow grounds, and is subordinated to four conditions including that acts be "the only way for the state to safeguard an essential interest against a grave and imminent peril".

Article XI of the US-Argentina BIT establishes a treaty-based defence, a *lex specialis*, which is distinct from the defence of necessity at customary international law. Any decision regarding Argentina's defences must begin with the Treaty Defence, construed in accordance with the principles of treaty interpretation. The defence of necessity at customary international law should then be considered as a separate, alternate defence.

2.3.2 Applying international law in the *CMS Award*

The tribunals in the *CMS* and *LG&E Awards* diverged significantly on their approach to prioritising and applying international law. This had a significant impact on how they addressed the Argentina's defences both under the treaty and at customary international law.

The CMS tribunal approached the application of international law to the dispute by adopting the position established in *Wena v Egypt.*[29] While this established that international law may be applied when relevant, the tribunal did not consider the basis on which international law principles would be applied to the dispute or how different sources of international law – that is, the treaty and customary international law principles – would interrelate. This led to a confused application of international law to the dispute, with no clear interrelationship or hierarchy between them.

---

[28] *CMS Gas Transmission Company v The Argentine Republic* ICSID Case No ARB/01/08 (Decision on Annulment) par 129

[29] *CMS Award* par 116 citing *Wena v Egypt* par 941

In reference to applicable laws to the dispute, both national and international, the tribunal held that "[a]ll of these rules are inseparable and will, to the extent justified, be applied by the tribunal".[30] The tribunal went no further in establishing or clarifying the relationship between different sources of international law. In regard to Argentina's defence it stated:

> The Respondent also invoked in support of its contention the existence of a state of necessity under both customary international law and the provisions of the Treaty. In so doing, the Respondent has raised **one** fundamental issue in international law.[31]

This indicates from the outset that the tribunal in the *CMS Award* regarded the application of international law to Argentina's defence under the BIT and customary international law as one and the same.

2.3.3 Applying international law in the *LG&E Award*

In contrast to the approach in the *CMS Award*, the *LG&E Award* began with a clear statement on the hierarchy of applicable laws to the dispute:

> In order to settle this controversy, the present Tribunal shall apply first the Bilateral Treaty; second and in the absence of explicit provisions therein, general international law, and third, the Argentine domestic law...[32]

And further:

> Applying the rules of international law is to be understood as comprising the general international law, including customary international law, to be used as an instrument for the interpretation of the Treaty. For example, where a term is ambiguous, or where further interpretation of a Treaty provision is required, the Tribunal will turn its attention to its obligations under articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, signed in 1969. [33]

---

[30] *CMS Award* par 117

[31] *CMS Award* par 308 (author's emphasis)

[32] *LG&E Award* par 99

[33] *LG&E Award* par 89

Although the tribunal made no reference to the principles of *pacta sunt sevanda, lex specialis* or article 38(1) of the *Statute of the International Court of Justice*, the hierarchy of applicable laws established by the tribunal reflects these principles.

2.4 Treaty Defence

This section compares and contrasts the tribunals' consideration of the Treaty Defence in the *CMS Award* with the *LG&E Award.*

2.4.1 Treaty Defence in the *CMS Award*

a) Merging the Treaty Defence with customary international law

The *CMS Award* by considering Argentina's defence with an analysis of the defence of necessity at customary international law,[34] before turning to article XI. It did not recognise the Treaty Defence as a *lex specialis*, nor did it give any consideration to this principle. The principle of *lex specialis* was only mentioned twice in the *CMS Award* and then only in context of a summary of the Argentina's arguments, as follows:

> ...ICSID's jurisprudence is uniform in respect of the application of the Treaty as *lex specialis*, complemented by customary international law where necessary. [35]

and

> [article XI provides] in the respondent's view, for the *lex specialis* governing emergency situations.[36]

The tribunal neglected this principle despite its specific inclusion by the International Law Commission in article 55 of the ILC Articles in the context of the defence of necessity:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.[37]

---

[34] On the application of the customary international law defence see below 2.5

[35] *CMS Award* par 102 citing *CMS Reply* par 60

[36] *CMS Award* par 344

Disregarding the *lex specialis* under the treaty, the tribunal merged the Treaty Defence with the defence at customary international law, and examined "whether the state of necessity or emergency meets the conditions laid down by customary international law **and** the treaty provisions".[38] By reading the strict requirements of the customary international law defence into the treaty regime, it reduced the treaty to a mere treaty-based reiteration of the customary international law defence of necessity.

Two subsequent awards in the Argentine Cases, *Sempra v Argentina* and *Enron v Argentina*, followed the *CMS Award* on its interpretation of the Treaty Defence.[39] Although these cases gave greater consideration to the concept of the Treaty Defence as *lex specialis* than the *CMS Award*, they ultimately rejected this approach and followed the approach of the CMS tribunal, imposing customary international law rules in the purported application of article XI of the US-Argentina BIT.[40]

(i) Sempra v Argentina

The tribunal in *Sempra* recognized that "a treaty regime specifically dealing with a given matter will prevail over more general rules of customary international law".[41] Despite acknowledging the principles of *lex specialis*, the Treaty Defence was not given priority because, according to the tribunal:

> [the treaty] did not deal with the legal elements necessary for the legitimate invocation of a state of necessity...the rule governing such questions will be thus found under customary international law.[42]

Furthermore:

---

[37] ILC Articles, above n26

[38] *CMS Award* par 374 (author's emphasis)

[39] Two of the arbitrators in these awards were also members of the Tribunal in the *CMS Award,* Professor Francisco Orrego Vicuna and the Honorable Marc Lalonde P.C., O.C., Q.C.

[40] While the reasoning in one award cannot be taken as the reasoning in the other. Given the absence of explanation in the *CMS Award*, the similarity in the issues in question, and the repetition of arbitrators, some parallels in the reasoning can be implied.

[41] *Sempra Award* par 378

[42] *Sempra Award* par 378

> In view of the fact that the Treaty does not define what is to be understood by an "essential security interest", the requirements for a state of necessity under customary international law... become relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the Treaty.[43]

Essentially the *Sempra Award* stepped from the treaty to customary international law because the treaty lacked the requisite elements to establish the defence.

(ii) Enron v Argentina

Similarly, the tribunal in *Enron* considered the principle of *lex specialis*, again disregarding its application to the Treaty Defence:

> ...the treaty regime is different and separate from customary law as it is lex specialis. This is no doubt correct in terms that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. Had this been the case here the Tribunal would have started out its considerations on the basis of the Treaty provision and would have resorted to the Articles on State Responsibility only as a supplementary means. But the problem is that the Treaty itself did not deal with these elements. The Treaty thus becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned.[44]

The reasoning of the tribunals in *Sempra* and *Enron* is circular. By searching for elements of customary international law in the Treaty Defence and then reverting to customary international law when those elements were not found, the tribunals presumed from the outset that the position at customary international law had priority. This fails to consider the *lex specialis* of the Treaty Defence and uses the treaty as a mere pointer to customary international law.

b) Textual similarities in the defences

The merging of the Treaty Defence and the defence of necessity at customary international law may stem from similarities in the language in the provisions, in

---

[43] *Sempra Award* par 375

[44] *Enron Award* par 334

particular, the use of the terms "necessary" and "security interests" in the Treaty Defence vis-à-vis "necessity" and "essential interests of state" in article 25 of the ILC Articles.[45]

The relevant sections in this regard are, in the Treaty Defence:

> measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own security interests

and the ILC Articles:

> Necessity may not be invoked by a state unless... does not seriously impair an essential interest of the State.

The leap from the Treaty Defence to customary international law on the basis of similar language ignores not only the textual differences between the defences, but also the principles of treaty interpretation at customary international law.

There is no rule of treaty interpretation, absent an explicit reference, which directs enquiry to "similar" customary international law principles. Article XI makes no reference to the ILC Articles or to customary international law.[46] Primarily, any treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[47] The *North Sea Continental Shelf Case* established that a *lex specialis* must be interpreted "in so far as their meaning was disputed or appeared uncertain".[48] Article 31 of the Vienna Convention allows us recourse to "any relevant rules of international law applicable to

---

[45] *Enron Award* par 333 states:

> ... the Treaty does not define what is to be understood by essential security interest. . The specific meaning of these concepts and the conditions for their application must be searched for elsewhere... because there is no specific guidance to this effect under the Treaty. This is what makes [sic] necessary to rely on the requirements of state of necessity under customary international law, as outlined above in connection with their expression in Article 25 of the Articles on State Responsibility, so as to evaluate whether such requirements have been met in this case

[46] The ILC Articles were established in 2001. But reference could have been made to earlier drafts of the articles or to principles of customary international law

[47] Vienna Convention, article 31(1) provides:

> A treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light its object and purpose.

[48] *FRG v Denmark, FRG v Netherlands* ICJ Reports 1969, 3 at 24; 41 ILR 29

the relations between the parties"[49] and, although this may include principles of customary international law, they do not supersede the treaty rules but are used to interpret those rules. An example of this is the interpretation of the term "necessary".

The term "necessary" has been interpreted on various occasions in international courts and tribunals.[50] A strict interpretation, which relied on customary international law principles, was undertaken by the ICJ in *Gabcikovo Nagymaros Project Case*, deciding that an act is "necessary" for the purposes of the necessity defence at customary international law if it is the only means to secure an essential state interest.[51] Also, in the *Oil Platforms Case*, the ICJ examined a clause relating to the use of force in the *US-Iran FCN Treaty*[52] again using the requirements of customary international law. It held that the "requirement of international law that measures taken avowedly in self-defence must have been **necessary** for that purpose is strict and objective, leaving no room for any measure of discretion".[53]

A considerably broader interpretation of "necessary" was adopted by the European Court of Human Rights when considering the *European Convention on Human Rights and Fundamental Freedoms*[54] and whether "the protection of morals in a democratic society necessitated measures taken" by the state. The term "necessary" was compared with other terms in the convention, and was placed in context between "indispensable" and "useful". The court concluded that "it is for the national authorities to make the initial assessment

---

[49] Vienna Convention, article 31(3)(c)

[50] For a detailed discussion on interpreting treaty terms in this context see Burke-White W & Von Staden A, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties" University of Pennsylvania Law School, Public Law Research Paper No. 07-14, Prepublication draft, 28-48 at http://papers.ssrn.com/abstract=980107 (1 May 2008)

[51] This case confirmed the requirements of the defence of necessity at customary international law

[52] *Treaty of Amity, Economic Relations, and Consular Rights, US—Iran* art. XX, August 15, 1955 (entered into force 16 June 1957) 8 U.S.T. 899, 284 U.N.T.S.93 cited in Burke-White W & Von Staden A, above n50, note 22

[53] *Oil Platforms (Iran v US)*, Judgment, 1996 ICJ 803 (12 December) par 73 cited in Burke-White W & Von Staden A, above n50, note 164 (author's emphasis)

[54] *European Convention on Human Rights and Fundamental Freedoms* CETS No 005, Rome, 4/11/1950 entry into force 3/9/1953

of the reality of the pressing social need implied by the notion of "necessity" in this context".[55]

A further interpretation of "necessary" is found in jurisprudence under the *General Agreement on Tariffs and Trade* 1947 (GATT) in the *Thailand Cigarettes Case*.[56] In that case Thailand banned foreign cigarettes, but allowed the sale of domestic produced cigarettes on the grounds that such restrictions were "necessary to protect human health", a measure it justified under article XX(b) of GATT.[57] The Panel held that the import restrictions "could be considered to be 'necessary' in terms of article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives".[58]

The above jurisprudence illustrates the wide scope for interpreting a treaty term. Previous interpretations given to treaty terms are relevant to the special context of those agreements and are only binding on the parties to those disputes.[59] A direct reference to customary international law, as occurred in the *CMS Award*, gives customary international law unjustified priority and disregards other equally valid interpretations from other sources of law.

---

[55] *Handyside v United Kingdom,* 24 Eur. CT.H.R. (ser. A) at 47 (1976) cited in Burke-White W & Von Staden A, above n50, 31

[56] Report of the Panel, *Thailand-Restriction on Importation of and Internal Taxes on Cigarettes,* 75, DS10/R (Oct. 5, 1990), GATT B.I.S.D. (37th Supp) at 200, 222 (1990) cited in Burke-White W & Von Staden A, above n50, 32

[57] Article XX(b) GATT, states in part:

> . nothing in this Agreement shall be construed to prevent the adoption or enforcement by any
>
> contracting party of measures:...
>
> (b) necessary to protect human ... life or health.

[58] Report of the Panel, *Thailand-Restriction on Importation of and Internal Taxes on Cigarettes,* 75, DS10/R-37S200 (Oct. 5, 1990), GATT B.I.S.D. (37th Supp) at 200, 222 (1990) par 75

[59] Burke-White W & Von Staden A, above n50, 32

c) Imposing additional elements on the Treaty Defence

The merging of the Treaty Defence with the defence of necessity at customary international law imposed additional requirements on the operation of the Treaty Defence. This included the requirements that the state actions be the "only way" for the state to safeguard an essential interest against a grave and imminent peril, and that the State has not "contributed to the situation of necessity."[60] The interpretation given by the tribunal also failed to respect the breadth of article XI. By limiting its consideration to safeguarding an "essential security interest", it disregarded two other limbs of the defence, namely "the maintenance of public order" and the "maintenance or restoration of international peace or security".[61]

d) Compensation

The merging of the Treaty Defence and customary international law defence in the *CMS Award* also affected the tribunal's interpretation of compensation.[62] The tribunal in *CMS v Argentina* considered that the "plea of necessity may preclude wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right which had to be sacrificed".[63] It relied on article 27 of the ILC Articles to establish this position:[64]

> The invocation of a circumstance precluding wrongfulness is without prejudice to
> a) compliance with the obligation in question, if and to the extent that the circumstance: precluding wrongfulness no longer exist;
> b) the question of compensation for any material loss caused by the act in question.

---

[60] The tribunals consideration of these elements are discussed below 2.5 1

[61] Article XI of the US-Argentina BIT. The full text of the US-Argentina BIT is provided at Appendix 4. Compare this interpretation with the *LG&E Award* which held that the Treaty Defence was established on two grounds; the maintenance of public order and the protection of its own security interests. See below 2.4.2d)

[62] *CMS Award* par 379. Because the tribunal held that a state of necessity was not established, the tribunal's comments in this regard were *obiter dicta.*

[63] *CMS Award* par 388

[64] *CMS Award* par 390

Article 55 of the ILC Articles sets out the principles of *lex specialis*.[65] This principle applies where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. Where they do not, the ILC specifically refers to the continued residual operation of the ILC Articles, stating that "article 55 makes it clear that the present articles operate in a residual way".[66]

The relevant question is whether the Treaty Defence requires the subsidiary application of article 27(b) of the ILC Articles to determine the question of compensation. Again this is a question of treaty interpretation:

> [O]ne of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[67]

Article XI of the BIT is drafted to allow states to take "measures necessary" in certain situations. Requiring compensation to be paid when such measures are taken, particularly in response to an economic crisis, nullifies the effect of the Treaty Defence. The *lex specialis* defence established under article XI of the BIT removes liability from a state in particular circumstances. The defense is conclusive and reference to customary international law or article 27(1) of the ILC Articles in a residual role is not required and is inappropriate.

---

[65] ILC Articles, article 55:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law

[66] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001, 140

[67] Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R (April 29, 1996). 35 I.L.M. 603, 627 (1996) cited in Burke-White W & Von Staden A, above n50, 14

e) Misapplication of the Treaty Defence

The parties to the US-Argentina BIT expressly established a specific defence under the treaty which exists independently from the defence of necessity at customary international law. The *CMS Award* does not interpret the Treaty Defence in this light but rather as a restatement of, or reference to, the defence of necessity at customary international law. If the parties' intention was to merely restate customary international law, one could expect this to be reflected in the text, for example, "this agreement is without prejudice to the defence of necessity at customary international law as provided for in article 25 of the ILC Articles".[68] Treating article XI as a mere reiteration of the customary international law defence renders the inclusion of article XI superfluous.

2.4.2 Treaty Defence in the *LG&E Award*

The *LG&E Award* applied the Treaty Defence as *lex specialis,* applying it independently from the defence of necessity pleaded at customary international law. The decision upholds the notion that state parties have the ability to agree to allocate risk outside of the framework provided by customary international law and to provide state parties with more or less protection than that available at customary international law.[69] This approach encompasses the breadth of article XI. It allows for the analysis of arguments in relation to both "the maintenance of public order" and the protection of "security interests".[70]

a) Establishing a *lex specialis*

Although no specific reference was made to the principle of *lex specialis* in the *LG&E Award,* the treaty defense established by article XI of the BIT was given precedence over

---

[68] This clause is not strictly necessary as the defence at customary international law exists regardless of its inclusion of the treaty. Professor Burke-White notes the inconsistent reasoning of the tribunal in the *Enron Award* in this regard, which requires an explicit textual reference for a clause to be accepted as self-judging, but deems it appropriate to infer the incorporation of the necessity elements from customary international law without such a reference. see Burke-White W & Von Staden A, above n50, note 157

[69] Burke-White W & Von Staden A, above n50, 69

[70] Argentina did no plead "maintenance or restoration of international peace or security" which is the third element of the Treaty Defence

the defence of necessity at customary international law. The tribunal correctly maintained the distinction between treaty and customary international law, dismissing arguments by the claimant that sought to merge elements from the customary international law defence of necessity with the Treaty Defence:

> Claimants contend that the necessity defence should not be applied here because the measures implemented by Argentina were not the **only means** available to respond to the crisis. The Tribunal rejects this assertion. Article XI refers to situations in which a State has no choice but to act. A State may have many several responses at its disposal to maintain public order or protect its essential security interests.[71]

This interpretation differs from that in the *CMS Award*, which imposed elements from the customary international law defence of necessity on the Treaty Defence, defeating its application.

b) Compensation

The LG&E tribunal was consistent in its treatment of the Treaty Defence as *lex specialis* when considering the question of damages.[72] Holding that Argentina was not liable for damages during the period of the emergency:

> Article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability.[73]

The tribunal regarded article 27 of the ILC Articles as inapplicable to the Treaty Defence, observing, *obiter dictum*, that in any event article 27 does not provide a conclusive answer to the question of compensation and does not specify the circumstances in which compensation would be payable.[74]

---

[71] *LG&E Award* par 239 (author's emphasis)

[72] *LG&E Award* par 266

[73] *LG&E Award* pars 261 & 266

[74] *LG&E Award* par 260 citing Crawford J, *The International Law Commissions' Articles on State Responsibility*, Cambridge University Press, 2002, 178. The observations in the *CMS Annulment Decision* were similar to those in the *LG&E Award*, par 146:

> Article XI, if for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period

c) Applying principles of treaty interpretation

Despite undertaking to interpret the treaty in accordance with its obligations under the Vienna Convention, including where necessary customary international law,[75] there is no evidence of their application in the *LG&E Award* in the consideration of the Treaty Defence. Had the tribunal been satisfied that all terms of the BIT were clear on a textual reading and could be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",[76] a statement to this effect would have made the tribunal's reasoning clearer and clarified that the treaty was interpreted in accordance with the principles of international law. The tribunal came close to this when considering the question of compensation and article 27 of the ILC Articles where its application was dismissed because "the Tribunal's interpretation of Article XI of the Treaty provides the answer".[77] But again, a reference to applicable principles of treaty interpretation would make the tribunal's reasoning clearer.

d) The Treaty Defence established

The tribunal considered that evidence of the conditions in Argentina as of December 2001 constituted the "highest degree of public disorder and threatened Argentina's essential security interests",[78] ultimately holding that "all of these devastating conditions - economic, political, social - in the aggregate triggered the protections afforded under Article XI of the Treaty to maintain order and control the civil unrest".[79] Argentina was excused under article XI of the BIT from complying with other BIT obligations during a prescribed period because:

---

[75] *LG&E Award* including pars 89, 99 & 206

[76] As required under the Vienna Convention, article 31

[77] *LG&E Award* par 260

[78] *LG&E Award* par 231

[79] *LG&E Award* par 237. The proceeding paragraphs in the award summarise the economic, political and social crisis in Argentina, referring to the drop in Argentina's Gross Domestic Product, the loss of deposits in the banking system, the rise of unemployment to 25% and that almost half the population were living below poverty.

> from 1 December 2001 until 26 April 2003 Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests.[80]

The approach taken in the *LG&E Award* is more convincing than that in the *CMS Award* from both a legal and policy perspective. It applies relevant legal principles and maintains the Treaty Defence established under the US-Argentina BIT as separate from the defence of necessity at customary international law and allows the states, in this case Argentina, greater freedom of action in cases of emergency.[81]

2.5 Customary International Law Defence of Necessity

The division between treaty law and other sources of international law is well established.[82] While treaty rules between states as *lex specialis* have priority over rules of customary international law, it does not follow that customary rules become irrelevant. Having established that Argentina was excused from responsibility for violation of its obligations under article XI of the BIT, the *LG&E Award* addressed the second ground of defence pleaded by Argentina, the defence of necessity at customary international law.[83] The tribunal's consideration of the defence was *obiter dictum* however, it is important to consider how it was applied and to compare this interpretation with that adopted in the

---

[80] *LG&E Award* pars 226-229. These dates coincide with the freezing of funds on bank accounts and the election of President Kirchner, events which in the opinion of the tribunal mark the beginning and end of the period of extreme crisis The tribunal did not consider the initial date for the state of necessity to be the date of the emergency law (6 January 2002) reasoning that the emergency had already started when the law was enacted. The state of emergency has still not been lifted by Argentina. Indeed the country has issued a record number of emergency decrees since 1901, emergency periods in Argentina being longer than non-emergency periods.

[81] Burke-White W & Von Staden A, above n50, 70. This thesis is concerned with the effects of the Argentine Cases on ICSID arbitration and this chapter focuses on the emergence of conflicting jurisprudence in those cases. For an interesting discussion on alternate methodologies for addressing the conflicting application of the Treaty Defense and the defence of necessity at customary international law see: Kurtz J, "Adjudging the Exceptional at International Law: Security, Public Order and the Financial Crisis", Institute for International Law and Justice Working Papers 2008/6, New York University School of Law at http://www.iilj.org/publications/2008-6Kurtz.asp (30 June 2009).

[82] See above at 2.2.2

[83] *LG&E Award* par 245

CMS Award.[84] The next section compares the interpretations of the defence of necessity adopted by the two tribunals.

2.5.1 Customary international law defence in the *CMS Award*

a) The "only way" criterion

A key element of the customary international law defence of necessity is the requirement in article 25(1)(a) of the ILC Articles that measures adopted be "the **only way** for a State to safeguard an essential interest against a grave and imminent peril".[85] The tribunals in the Argentine Cases to date have agreed in principle on this requirement but have diverged on the crucial question of whether Argentina's measures responding to the crisis satisfy this criterion.

Traditionally the "only way" requirement has been interpreted strictly. The ILC commentary states that the plea of necessity is "excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient"[86] and that "the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered".[87] In the *Gabcikovo Nagymaros Project Case* the ICJ rejected the defence of necessity on the grounds that unilateral suspension and abandonment of a project was not the only course available in the circumstances. The court came to this conclusion after considering the amount of work already undertaken on the project, the money spent and the possibility of remedying

[84] This is particularly important for the remaining Argentine Cases. Not all BITs will contain a separate defence of necessity as provided for in article XI of the US-Argentina BIT, nor does the existence of a treaty defence remove the defence at customary international law. See above 2.2.4

[85] ILC Articles, article 25(1)(a) (author's emphasis)

[86] *CMS Award* pars 323-324

[87] "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" *Yearbook of the International Law Commission*, 2001, vol. II, Part Two at 83 note (15)

problems by other means.[88] The stringency of the test was reaffirmed by the ICJ in its *Advisory Opinion on Israel's Security Wall* where it specifically endorsed article 25(1)(a) and found:

> that [it] was not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.[89]

In line with early interpretations, the *CMS* tribunal interpreted the "only way" requirement restrictively. It considered that "a variety of alternatives, including dollarization of the economy, granting of direct subsidies to the affected population or industries and many others" were available to Argentina and thus precluded satisfaction of the "only way" requirement.[90] The tribunal avoided any analysis of the appropriateness of these alternatives on the grounds that establishing which of these policy alternatives would have been better was beyond the scope of its task.[91]

The tribunal's failure to consider the suitability of policy alternatives available to Argentina leaves the threshold for the "only way" criterion restrictively high, and essentially bars this defence for use in an economic crisis.[92] The circumstances in which a government will have only one policy measure at its disposal are rare, if not non-existent,[93] a point acknowledged by the tribunal in *Sempra v Argentina*:

> A rather sad global comparison of experiences in the handling of economic crises shows that there are always many approaches to addressing and resolving such critical events. It

---

[88] *Gabcikovo Nagymaros Project* Case at 55 cited in International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001, 83 note (15)

[89] *Advisory Opinion on Israel's Security Wall* at par 140 cited in Reinisch A, "Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? *The Journal of World Investment and Trade*, 191, 199

[90] *CMS Award* pars 323, 324

[91] *CMS Award* par 324

[92] Reinisch A, above n89, 200

[93] Waibel M, "Two World of Necessity in ICSID Arbitration: *CMS and LG&E*"(2007) 20 *Leiden Journal of International Law* 637, note 57 and accompanying text

> is therefore difficult to justify the position that only one of them was available in the Argentine case.[94]

To hold that there were other ways of safeguarding relevant essential interests without considering whether these means would have been effective, or whether they were reasonable in the circumstances, leaves open the possibility that: those solutions were entirely inappropriate; may not have provided a resolution to the situation; or may have been entirely unreasonable in the circumstances.

b) The "no contribution" requirement

The defence of necessity is excluded if the state invoking necessity contributed to the situation of necessity.[95] The *CMS Award* held that Argentina could not satisfy this requirement.[96] This was based on the sweeping assertion that:

> [Argentina's] policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.[97]

The tribunal undertook no analysis or scrutiny of the degree of contribution made by Argentina, nor did it indicate what level of contribution is sufficient to negate the defence.[98] The tribunal acknowledged that a state relying on the defence of necessity in the case of an economic crisis will almost always have contributed to the crisis:

> ...similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact.[99]

---

[94] *Sempra Award* par 350

[95] ILC Articles, articles 25(2)(b)

[96] *CMS Award* par 328 citing International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001, 84 note (20)

[97] *CMS Award* par 329

[98] Reinisch A, above n89, 204

[99] *CMS Award* par 328

This acknowledgement essentially excludes a state from relying on the defence of necessity under customary international law in the case of an economic emergency.

2.5.2 Customary international law defence in the *LG&E Award*

a) The "only way" criterion

The *LG&E Award* acknowledged the customary international law requirement that "the act must be the only means available to the state in order to protect an interest".[100] The tribunal also recognised the strictness of this test:

> [this] requirement implies that it has not been possible for the State to avoid by any other means, even a much more onerous one that could have been adopted and maintained the respect of international obligations. The State must have exhausted all possible means before being forced to act as it does.[101]

In spite of this, the tribunal approached the "only way" element in a flexible manner. It interpreted Argentina's "economic recovery package" as one measure and did not break down the package into individual parts. This allowed the tribunal to conclude that:

> ...an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across the board response was necessary, and the tariffs on public utilities had to be addressed.[102]

The interpretation in the *LG&E Award* allows a state to react flexibly by choosing among several "necessary and legitimate measures"[103] and maintains the viability of the defence in circumstances of economic crisis.[104] On the other hand, allowing the defence to be invoked where measures taken were not the "only way" to respond to the crisis circumvents the exceptional nature of the defence at customary international law, and

---

[100] *LG&E Award* par 250

[101] *LG&E Award* par 250 (citations omitted)

[102] *LG&E Award* par 257

[103] *LG&E Award* par 200

[104] Reinisch A, above n89, 201

potentially allows the defence to be established even if the specific elements of measures adopted were inadequate or inappropriate to respond to the situation.

b) The "no contribution" requirement

In contrast to the *CMS Award*, the *LG&E Award* held that "there is no serious evidence in the record that Argentina contributed to the crisis resulting in a state of necessity".[105] The *LG&E* tribunal avoided analysing Argentina's contribution to the crisis by altering the burden of proof for this defence and placing it on the claimant:[106]

> The Tribunal considers that...Claimants have not proved that Argentina has contributed to cause the severe crisis faced by the country.[107]

As a general principle of law, the burden of proof falls on the party invoking the exception. On this basis, the existence of each element had to be proved by Argentina as the party relying on the exception.[108] To require otherwise would leave the investor with an unreasonable burden to prove that a potential defence should not apply, which for all practical purposes, would be impossible to prove.

2.5.3 Unsatisfactory application of the customary international law defence

The tribunals' application of the defence is inadequate in both awards. The impact on the *LG&E Award* was minimal, as Argentina's defence was established under the Treaty Defence. Arguably the customary international law defence was interpreted to support this holding, or at least revealed an attempt by the tribunal to maintain the applicability of the defence to an economic crisis. The *CMS Award's* consideration of the customary international law defence was fundamental, as the tribunal read both limbs of Argentina's defence to rest on this highly exceptional defence.

---

[105] *LG&E Award* par 257

[106] Waibel M, above n93, 642

[107] *LG&E Award* par 256

[108] Schill S W, "International Investment Law and the Host State's Power to Handle Economic Crises – Comment on the ICSID Decision in LG&E v. Argentina" (2007) 24(3) *Journal of International Arbitration* 265, 280

The customary international law defence of necessity is an exceptional defence and both tribunals recognised the need for care in its application to avoid abuse. If the strict conditions of the defence are loosely applied, a state could invoke necessity to elude its international obligations. The approaches in the *CMS* and *LG&E Awards* to the defence correctly identify the requisite elements of the defence but diverge on their application. The shortfalls in the tribunals' analysis of the defence stem from the difficulty of establishing causes and effects of a sovereign debt crisis, which are debated by economists indefinitely.[109] They also highlight that if the defence of necessity under customary international law is to maintain a role in an economic context, some consideration of adequacy of measures and proportionality is required.[110] The lack of jurisdiction to assess the adequacy of states macro-economic policies also contributes to the tribunal's failure to analyse the strict requirements of the defence in any depth.[111]

2.6 Binding Precedent in ICSID Awards

There is no rule of binding precedent under the ICSID Convention; awards are binding only on the parties to the award.[112] While this principle is recognised by tribunals,[113] as a matter of practice, the reference by tribunals to earlier awards suggests that tribunals will carefully consider previous awards before making a decision. This was clearly put by the tribunal in *El Paso Energy International Company v The Republic of Argentina*:

> ...the present Tribunal knows of no provision...establishing an obligation of *stare decisis*. It is, nonetheless, a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals. The present Tribunal will follow the same line, especially since

[109] For an interesting discussion on the appropriateness of the defence of necessity to financial crises see, Waibel M, above n 93

[110] Reinisch A, above n89, 201

[111] Waibel M, above n93, 642

[112] ICSID Convention, article 53(1)

[113] *Enron v Republic of Argentina* ICSID Case No ARB/01/3 (Decision on Jurisdiction) par 8

> both parties, in their written pleadings and oral arguments, have heavily relied on precedent.[114]

There are arguments that the doctrine of binding precedent should be formalised in ICSID arbitrations, and some tribunals have sought to incorporate this doctrine in their awards, holding that arbitrators:

> pay due consideration to earlier decisions of international tribunals...subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases [and] a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[115]

Setting aside the question of whether or not a system of formal precedent should be established,[116] some consideration of earlier decisions, particularly in a situation where the facts and legal issues of cases are virtually identical, is desirable. How earlier decisions are used calls for a balanced approach:

> The Tribunal wishes to emphasize that it has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards. Having reached its conclusions, however, the Tribunal thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules and arising out of claims under contemporary bilateral investment treaties. We summarize a few of these decisions here, and confirm that we have not found or been referred to any decisions or awards reaching a contrary conclusion.[117]

This statement illustrates an awareness of earlier cases and a respectful consideration of the conclusions they have drawn.

---

[114] *El Paso Energy International Company v The Republic of Argentina* ICSID Case No ARB/03/15 (Decision on Jurisdiction) par 39. See also, *AES Corporation v Argentina* ICSID Case No ARB/02/17 (Decision on Jurisdiction) pars 17-33, repeating the arguments of the claimant stated:

> decisions, treated more or less as if they were precedents, tends to say that Argentina's objections to the jurisdiction of this Tribunal are moot if not even useless since these tribunals have already determined the answer to be given to identical or similar objections to jurisdiction.

[115] *Saipem SpA v Bangladesh* ICSID Case no ARB/05/07 (Decision on Jurisdiction) par 67 cited in McLachlan C, above n20, 379

[116] This point is well debated by scholars see for example, Kaufmann-Kohler Gabrielle, "Arbitral Precedent: Dream, Necessity or Excuse?" Freshfields Lecture (2007) 23 *Arbitration International* 357

[117] *Gas Natural SDG, S A v The Argentine Republic*, ICSID Case No ARB/03/10 (Decision on Jurisdiction) cited Di Pietro D, "The Use of Precedents in ICSID Arbitration: Regularity or Certainty?"(2007) 10 (3) *International Arbitration Law Review*, note 22

In order for ICSID awards to contribute to the development of international law principles, tribunals must give appropriate regard to earlier decisions. A striking aspect of the *LG&E Award* is its selective reference to the *CMS Award.* The award cites the *CMS Award* in support of its findings on a number of occasions.[118] However, on the issue of Argentina's defence, where the tribunal diverges significantly from the *CMS Award*, it avoids any reference to the earlier decision. Although not bound by earlier awards, the failure to refer to the reasoning in the *CMS Award* on this issue raises doubts as to whether the LG&E tribunal's divergent opinion can be defended. It also fails to establish a complete and clear interpretation of the relevant legal issues. This approach is objectionable because it creates confusion on the interpretation of a significant area of law and makes it difficult for subsequent tribunals to rely on this jurisprudence either in a formal or informal context.

The *Sempra Award* also referred selectively to previous ICSID awards relating to the defence of necessity. Acknowledging that the *LG&E* and *CMS Awards* had come to different findings regarding Argentina's defence, the tribunal followed the *CMS Award* based on its assessment of facts, remarking that "[t]his tribunal...is not any more persuaded...about the crisis justifying the operation of emergency and necessity",[119] neatly avoiding following or distinguishing "the differences in the legal interpretation"[120] made in the *LG&E Award.*

Despite the lack of formal precedent in arbitration, the recourse to earlier awards by practitioners in order to advise and represent clients,[121] and the use of early awards as an

---

[118] For example, in relation to fair and equitable treatment *LG&E Award* pars 125, 127-128; and in relation to the interpretation of the umbrella clause *LG&E Award* par 171

[119] *Sempra Award* par 346

[120] *Sempra Award* par 346

[121] See Frank S D, "The Legitimacy Crisis In Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 *Fordham Law Review* 1521, note 438, where she quotes various leading practitioners in their use of investment awards to interpret similar provisions in investment treaties.

informal precedent, is well established.[122] The pronouncement of conflicting arbitral awards in regard to substantive issues makes it difficult to formulate rules of general application; there should consequently be efforts to adhere to common principles in regard to both procedural and substantive issues, thus formulating rules of general application.

2.7 Impact of Inconsistency

The inconsistencies in the *CMS* and *LG&E Awards* raise concerns that the Argentine Cases will be a major source of inconsistent ICSID awards.[123] The *LG&E Award* indicates that tribunals will not necessarily follow the informal precedent established by earlier tribunals. Furthermore, the expectation that Argentina will settle claims in light of the first few rulings seems unlikely following the conflicting awards. The very inconsistency of the awards could, to this end, prolong proceedings. Indeed, since the *LG&E Award* and the *CMS Annulment Decision*, Argentina has lodged annulment proceedings against both the *Sempra* and *Enron Awards.*[124] Arbitrator on several ICSID panels, Brigitte Stern, who wrote an article in 1980 on the lack of uniformity in arbitral

---

[122] Examples of tribunals citing previous awards in support for awards are numerous. See, *CMS Award* pars 110 & 116 citing respectively *Tecnicas Medioambientales Tecmed SA v United Mexican States* ICSID Case No ARB(AF)/00/2 and *Wena v Egypt*

[123] Inconsistency in arbitral awards is not particular to the Argentine Cases. Particular concerns over inconsistency were raised following the high profile *Lauder Arbitrations* which involved two arbitral tribunals arriving at different conclusions over an identical dispute claimed under two separate BITs: *CME v Czech Republic* and *Ronald Lauder v. Czech Republic Case RH 2003. 55; UNCITRAL Award September 2001.* Another well known example is the *SGC Arbitrations* where awards brought by an investor against two independent states were irreconcilable. The cases involved the interpretation of the "umbrella clause". In the first case *SGC Société Générale de Surveillance S.A v. Islamic Republic of Pakistan* ICSID Case No ARB/01/13 the Tribunal came to the conclusion that an umbrella clause cannot transform a failure to pay fees under a concession contract into a treaty breach. The Tribunal in the second case *SGS Société Générale de Surveillance S A v Republic of Philippines* ICSID Case No ARB/02/6 (29 January 2004) came to the opposite conclusion.

[124] The Secretary-General registered applications against the *Sempra Award* on 30 January 2008 and the *Enron Award* on 22 May 2008 at http://icsid worldbank.org/ICSID/FrontServlet (30 May 2008). Applications for annulment have not been published however given the awards close reliance on the *CMS Award* it is likely that the divergent and more favourable reasoning in the *LG&E Award* has influenced the applications for annulment.

law titled "The Arbitrations, One Problem, Three solutions" referred to the potential in the Argentine Cases for "20 arbitrations, one problem and 20 solutions".[125]

The Argentine Cases will be consulted by states and investors alike for guidance as to how a state may lawfully respond to national emergencies. The consideration of these issues in the early Argentine Cases provides conflicting guidance. The fact that these are the first of over 40 cases to address these issues accentuates the influence these cases will have.

The possibility of inconsistent awards in ICSID arbitration means that parties may benefit from having more than one avenue to access arbitration. Lawyers may advise investors to structure investments in ways to capture potential inconsistencies. For example, a US citizen investing in Argentina through a French company potentially has the benefit of both the US-Argentina BIT and the French-Argentina BIT, and therefore a greater expectation of benefiting from a favourable interpretation of at least one of those treaties in the event a dispute arises.[126]

Lack of clarity and consistency of rules of law and their application has a detrimental effect on those governed by those rules and their ability and desire to adhere to those rules. It upsets predictability and prevents reliance on the system by its clients; individuals, companies and governments cannot anticipate how to comply with the law and plan their conduct accordingly.[127] Investors become unable to predict whether coverage afforded by investment treaties will in fact be awarded to them, while states are left to explain why they are subject to damage for awards for millions of dollars in one case but not another.[128] The Argentine cases may influence the view that predictability of ICSID arbitral awards is so incalculable that the risks of proceeding with arbitration

---

[125] Quoted in Goldhaber M D, "Wanted: A World Investment Court" (2004) 1 (3) July *Transnational Dispute Management*

[126] This scenario is at the centre of the Lauder Arbitrations see above note 123. Franck S D, above n121, 1534

[127] Ibid, 1584

[128] Ibid, 1558

outweigh the potential benefits. A tribunal's ability to interpret a treaty provision so restrictively as to deprive a state of a legal mechanism designed to reallocate risks in exceptional circumstances,[129] such as occurred in the *CMS Award*, means that states may need to reconsider the benefits of concluding or renewing BITs.

The first awards in the Argentine Cases have not generated a smooth beginning for the assessment of applicable international law rules and the defences of necessity under treaty and customary international law. It remains to be seen whether tribunals in the remaining cases will be guided by the decision in the *LG&E Award* enabling the establishment of an informal precedent and a settling of legal principles, or whether the divergence of opinion on the issues in Argentine Cases will persist over the next few years. What is clear is that ICSID will not benefit from the latter. Conflicting awards regarding the Treaty Defence and the defence of necessity at customary international law mean that Argentina was able to establish a defence in one case but not in others. This logically leads to a consideration of the review options available for ICSID awards, the subject of the following chapter.

[129] Burke-White W, "The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System" (January 24, 2008) University of Pennsylvania Law School Institute for Law & Economics, Research Paper No. 08-01, 75 at http://ssrn.com/abstract=1088837 (1 May 2008)

Chapter 3

Review of ICSID Awards

3.1 Introduction

Chapter 2 examined the inconsistencies between early awards in the Argentine Cases, focusing on the tribunals' consideration of Argentina's defences of necessity. The existence of contradictory rulings in virtually identical cases suggests that at least one award is incorrect. Hence the need to consider the options available to parties seeking a review of ICSID awards. This chapter considers the grounds of review available under the ICSID Convention, with a particular focus on annulment proceedings which have been instituted in a number of the Argentine Cases.

The grounds for annulment are limited to an exclusive list of procedural errors under article 52 and the ICSID Convention provides no review for errors of substance. The first decision on annulment in the Argentine Cases against the *CMS Award* (hereinafter the "*CMS Annulment Decision*") underlines the narrow scope for annulment of ICSID awards. In spite of errors in the award identified by the committee, the award remains binding on the parties. This emphasises that currently the ICSID system requires a demonstrably incorrect award to retain its binding force.

This chapter explores the debate regarding the adequacy of the annulment procedure and the balance between the competing objectives of finality and accuracy. Against this background it analyses the *CMS Annulment Decision*. The chapter proceeds sequentially through the committee's decision, not to reconsider the parties' substantive arguments, but to demonstrate how the committee has applied the procedural ground for annulment. It discusses the potential impact of the Argentine Cases on the ICSID annulment mechanism and the contribution the cases may make to the development of a more comprehensive review of ICSID awards.

3.2 Review of Investment Treaty Arbitral Awards

The breadth of review of decisions in legal systems varies considerably. The review of a decision, judgment or award can occur at two levels. The first level is a review of process, the second a review of substance. A review of process refers to the framework in which a decision is made, including the powers and composition of a tribunal. A review of substance concerns the content of a decision and the correctness of the determination of the facts of a dispute and the application of law to those facts.[1]

Traditionally the general policy of arbitration, in both a domestic and international context, is that an arbitral award is final and binding. Any review is limited to questions of procedure, thus adhering to and protecting the finality of a tribunal's award.[2] There is no coherent system for the review of arbitral awards in investment treaty arbitration and the extent of review permissible depends on the system under which an award is rendered and enforced.[3] Of those systems, ICSID arbitration abides most closely to the presumption of finality, by offering only a very limited scope for review of its arbitral awards.

The ICSID process is self-contained and the ICSID Convention does not allow for review of awards by domestic courts or authorities, at any stage, or in relation to any aspect of the proceedings.[4] The review of ICSID awards is limited to the grounds provided in the ICSID Convention:

---

[1] Walsh T, "Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality" (2006) 24(2) *Berkley Journal of International Law* 444, 451

[2] Feldman M B, "The Annulment Proceedings and the Finality of ICSID Arbitral Awards" (1987) 2 *ICSID Review Foreign Investment Law Journal* 85, 85

[3] The majority of investment treaty arbitrations are conducted under ICSID. A significant number are also conducted under the *UNCITRAL Arbitral Rules*, see above, Chapter 1, n43

[4] ICSID Convention, article 26:

> Consent of the parties to arbitration under this Convention shall, unless otherwise states, be deemed consent to such arbitration to the exclusion of any other remedy. .

For a discussion on the enforcement of ICSID Awards see below 4.2.2(b)

i) rectification of any clerical, arithmetical or similar error;[5]

ii) interpretation of a dispute concerning the meaning or scope of the award;[6]

iii) revision of an award on the ground that new facts have emerged which may affect the award decisively and were unknown to the tribunal and to the party seeking to introduce these facts;[7] or

iv) the grounds for annulment under article 52 are met.[8]

---

[5] ICSID Convention, article 49(2):

> (2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

[6] ICSID Convention, article 50:

> (1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.
>
> (2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

[7] ICSID Convention, article 51. Revision of awards is by the same or a new tribunal. The new elements must be ones of fact and not law and the facts must be of such a nature that they would have led to a different decision had they been known to the tribunal.

[8] ICSID Convention, article 52:

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> (a) that the tribunal was not properly constituted;
>
> (b) that the tribunal has manifestly exceeded its powers;
>
> (c) that there was corruption on the part of a member of the tribunal;
>
> (d) that there has been a serious departure from a fundamental rule of procedure; or
>
> (e) that the award has failed to state the reasons on which it is based.
>
> (2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.
>
> (3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

Annulment is the highest level of review of an ICSID award. Whereas rectification (article 49(2)), interpretation (article 50) and revision (article 51) can be made by the tribunal which rendered the award, a request for annulment (article 52) is submitted to an *ad hoc* committee of three arbitrators appointed by the chairman of ICSID's Arbitration Council. The committee may not include any person who served on the original tribunal, or who is of the same nationality of any member of that tribunal or either party to the proceedings.[9]

In contrast to ICSID, an investment treaty award rendered under other arbitration rules, such as the UNCITRAL Arbitration Rules or the ICC Arbitration Rules, is not subject to an internal annulment procedure. These awards do, however, face potential review by domestic courts, whether in the country at the seat of arbitration or the country where enforcement of an award is sought.[10] The extent an arbitral award can be thus reviewed is limited by the relevant state's arbitration statute.[11] In most jurisdictions scope for review is narrow and limited to questions of legitimacy of process, though some countries allow for review on issues of law. A significant number of states base their arbitration statutes on the *UNCITRAL Model Law on International Commercial Arbitration* (Model Law).[12] In addition to a number of procedural grounds, article 36(1)(b) of the Model Law

---

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter

[9] ICSID Convention, article 52(3). This ensures a fresh committee is established, but removes the aspect of choice used by the parties when establishing the tribunal under articles 31(2) and 40(2).

[10] Franck S D, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 *Fordham Law Review* 1521, 1551 & 1555

[11] Walsh T, above n1, 451

[12] The Model Law is designed to assist states in reforming and modernizing their laws on international commercial arbitration. It is not a treaty but a template which states are able to adopt if they chose. The Model Law reflects worldwide consensus on key aspects of international arbitration practice having been accepted by states of all regions and the different legal or economic systems of the world. See, *UNCITRAL Model Law on International Commercial Arbitration* (amended 2006) at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (6 November 2008)

permits national courts to decline to enforce an award if the subject matter of the dispute is not capable of settlement by arbitration or, if recognition or enforcement of the award would be contrary to public policy.[13] A state's grounds for review of arbitral awards can be wider than those suggested under the Model Law. Illustrative is the position in the United Kingdom under the *Arbitration Act* 1996, which provides that a party may appeal to the court on a question of law when the decision of the tribunal is "obviously wrong" or "of general public importance" and is "at least open to serious doubt".[14]

Parties to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (the "New York Convention") have additional grounds by which to block enforcement of awards. The New York Convention provides for limited grounds on which national courts can decline to recognise and enforce an award. In contrast to ICSID, the New York Convention allows a national court to refuse to recognise and enforce an award if it would "be contrary to the public policy of that country".[15]

---

[13] *UNCITRAL Model Law on International Commercial Arbitration* (amended 2006), article 36(1)(b) cited in Baldwin E, Kantor M & Nolan M, "Limits to Enforcement of ICSID Awards" (2006) 23(1) *Journal of International Arbitration* 1, 4

[14] *Arbitration Act* 1996 (United Kingdom) section 69 – this is a non-mandatory fall back provision, which only applies to the extent that the parties have not made their own arrangements regulating this issue, for example an agreement to arbitrate under the ICC Rules has the effect of excluding the right to appeal to the court on a point of law because the rules provide that the parties waive their right to any form of recourse insofar as such waiver can be validly be made; ICC Rule, Article 28(6) in Collins (ed), *Dicey, Morris and Collins on The Conflict of Laws*, 14th Edition, Sweet & Maxwell, London, 2006, 728; Indonesia provides another example, it specifically allows an award to be set aside if it "contains contradictory decisions" Sudgargo Gaetama, Indonesia, in Paulsson J ed., "International Handbook on Commercial Arbitration" at annex I-4, art. 643 cited in Franck S D, above n10, notes 114 & 124

[15] New York Convention, article V :

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

3.3 Annulment under ICSID

The exclusive grounds for annulment under article 52 of the ICSID Convention are that:

(a) the tribunal was not properly constituted;

(b) the tribunal has manifestly exceeded its powers;

(c) there was corruption on the part of a member of the tribunal;

(d) there has been a serious departure from a fundamental rule of procedure; or

(e) the award has failed to state the reasons on which it is based.

The most frequently used grounds for annulment are those in paragraphs (b) and (e) above, this chapter focuses on these grounds.

3.3.1 Distinguishing annulment from appeal

Annulment under the ICSID Convention is a procedural review, not a substantive review or an appeal on the merits of an award. This distinction is clear from the wording of article 53, which provides that "the award shall not be subject to any appeal or to any other remedy except those provided for in the ICSID Convention". Annulment proceedings thus constitute an "other remedy" provided for under the Convention.[16] The practical difference between annulment and appeal is also clear from its respective outcome: the result of a successful annulment application is the invalidation of the original decision; in contrast, a successful appeal results in the modification of a decision. In other words, a decision maker exercising the power to annul has two choices, to leave

---

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

[16] Schreuer C, *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge (2001), 891 par 8

the original decision intact or to declare it void; an appeals body may, on the other hand, substitute its own decision on the merits for a decision it finds to be deficient.[17]

An ICSID tribunal's mistake of law or fact cannot justify the annulment of an award as neither of these grounds constitutes a ground for annulment under article 52. The role of the *ad hoc* committee is to examine the procedural propriety of the award.[18] The annulment procedure was drafted as an exceptional remedy to ensure that the arbitrators do not exceed their jurisdiction and that proceedings conform to minimum standards of procedural justice.[19]

The language used in article 52 – "manifest", "serious" and "fundamental" – suggests on ordinary principles of interpretation that the powers of an *ad hoc* committee were intended to be extremely limited.[20] The *ad hoc* committee in *Maritime International Nominees Establishment* v *Republic of Guinea* (hereinafter the *MINE Case*) described the limited function of annulment proceedings in the following terms:

> Article 52(1) makes it clear that annulment is a limited remedy. This is further confirmed by the exclusion of review of the merits of awards by Article 53. Annulment is not a remedy against an incorrect decision. Accordingly, an *ad hoc* Committee may not in fact reverse an award on the merits under the guise of applying article 52.[21]

Despite its exceptional nature, the first two awards referred to annulment committees in the 1980s were annulled.[22] These decisions were considered to have exceeded their mandate, going beyond the safeguard of procedural regularity and penetrating the merits

---

[17] Ibid, 891 par 10

[18] Franck S D, above n10, 1546

[19] ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) 4 ILM 524 cited in Feldman M B, above n2, 10

[20] Redfern A, "ICSID Losing its appeal" (1987) 3 *Arbitration International* 98, 102

[21] *Maritime International Nominees Establishment v Republic of Guinea* ICSID Case No ARB/84/4 (Decision on Annulment) (*MINE Case*); see also, Schreuer C, above n16, 892 par 12

[22] *KlöcknerIndustrie-Anglagen GmbH and others v United Republic of Cameroon & Société Camerounaise des Engrais* ICSID Case No ARB/81/2 (Decision on Annulment); *Amco v Indonesia* ICSID Case No ARB/81/1 (Decision on Annulment), 25 (1986) *ILM* 1439

of the disputes they examined,[23] improperly crossing the line between annulment and appeal.[24]

The use of annulment proceedings as a quasi-appeal generated concerns regarding the finality and legitimacy of ICSID awards[25] and critics argued that ICSID arbitration would degenerate into an inconclusive battle between arbitrations, with all cases resulting in two proceedings.[26] The former Secretary-General of ICSID, Ibrahim Shihata, commented that:

> If the parties, dissatisfied with an award made it practise to seek annulment, the effectiveness of the ICSID machinery might become questionable and both investors and Contracting States might be deterred from making use of ICSID arbitration.[27]

The early annulment decisions have been dismissed as a "breaking in" period of inexperience among arbitrators and lack of "any previous interpretation of the [Washington] Convention and a lack of sufficiently clear or consistent indications from prior international practice".[28] Subsequent *ad hoc* committees have confirmed the limited nature of annulment proceedings, which is illustrated below.

3.3.2 Manifest excess of power (article 52(1)(b))

The parameters of an ICSID tribunal's power lie in the ICSID Convention and any other additional agreements between the parties.[29] Any tribunal which goes beyond these parameters exceeds its powers. In order to constitute a ground for annulment, an excess of power must also be "manifest", which relates not to the gravity of the excess of power,

---

[23] Knull W H & Rubins N D, "Betting the Farm on International Arbitration: Is it time to offer and appeal option?" (2000) 11 *American Review of International Arbitration* 531, 552

[24] Schreuer C, "Three Generations of ICSID Annulment Proceedings" in Gaillard E & Banifatemi, Y (Eds) *LAI International Arbitration Series NO. 1, Annulment of ICSID Awards* Juris Publishing, 2004, 17, 18

[25] There is no appeal from the decision of an *ad hoc* committee annulling an award. The only option for a disgruntled party is to resubmit the case for arbitration by a new tribunal under ICSID Convention article 52(6).

[26] Feldman M B, above n2, 7

[27] ICSID, *Report of the Secretary of State to the Administrative Council* ICSID Doc. No. AC/86/4 Oct 2 1986 Annex A

[28] *KlöcknerIndustrie-Anglagen GmbH and others v United Republic of Cameroon & Société Camerounaise des Engrais* ICSID Case No ARB/81/2 (Decision on Annulment) par 118 cited in Knull W H & Rubins N D, "Betting the Farm on International Arbitration: Is it time to offer and appeal option?" (2000) 11 *American Review of International Arbitration* 531, 553

[29] Schreuer C, above n16, 932 par 135

but to the ease with which it is perceived.[30] It requires that an excess of power be self-evident and not the product of elaborate interpretations one way or another.[31]

In establishing whether a tribunal has exceeded its powers, *ad hoc* committees will turn to the well established concept of excess of powers of arbitral tribunals in public international law.[32] An award by a tribunal that lacks jurisdiction is an obvious example of an excess of power.[33] Article 25 of the ICSID Convention deals with the elements of jurisdiction; a deficiency in meeting any of these requirements would mean there is no jurisdiction over a dispute.[34] For example, a dispute which did not arise directly out of an

---

[30] Ibid, 933 par 138, the requirement that an excess of powers be manifest means that not every excess of power or departure from a rule of procedure is sufficient to annul an award, making it a narrower ground for control of awards than those contained in other arbitration regimes,

[31] *Wena v Egypt* par 25

[32] For example the *ad hoc* committee in *Klöckner* referred to the Permanent Court of Arbitration's award in *Orinco Steamship Company* Permanent Court of Arbitration, October 25, 1910 (*The Hague Court Reports* at 226) as establishing the definition of excess of powers:

> "The excess of power may consist not only in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the Agreement governing the manner in which they are to reach their decision, notably with regard to the statutes or principles of law to be applied...Excess of power can take the form of the failure of the arbitrator to apply the rules set forth in the arbitration agreement or in the application of other rules"

[33] Schreuer C, above n16, 936 par 147

[34] ICSID Convention, article 25:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
>
> (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.
>
> (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider

investment, a dispute where there was no consent to arbitration, or if the investor's nationality requirements are not met, would all serve as the basis for a claim that there has been an excess of power and grounds for annulment under article 52(1)(b).[35]

Failure to apply the proper law to arbitration has also been held to constitute a manifest excess of power and ground for annulment.[36] The clearest example is where the parties agree to apply a certain law to a dispute, such as the laws of Argentina, and the tribunal applies a different law, such as the law of Germany. *Ad hoc* committees have drawn a distinction between the failure to apply a law and error in its application. An assessment of the latter reopens the merits in the proceedings and turns an annulment into an appeal.[37] The reasoning for this ground of annulment was explained by the *ad hoc* committee in the *MINE Case*:

> [A] tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision ex aequo et bono. If the derogation is manifest, it entails a manifest excess of power.
>
> Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment.[38]

The concept of an excess of a power as a ground of control to arbitral awards is not unique to ICSID arbitration, however the requirement that such excess of power be "manifest" requires a strictness of interpretation which reinforces the protection of the principle of finality of ICSID awards.

---

submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

[35] Schreuer C, above n16, 937 par 149

[36] *KlöcknerIndustrie-Anglagen GmbH and others v United Republic of Cameroon & Société Camerounaise des Engrais* ICSID Case No. ARB/81/2 (Decision on Annulment) (*Klöckner*), *Amco v Indonesia* ICSID Case No ARB/81/1 (Decision on Annulment) par 515, 25 ILM 1439(1986); *MINE Case* (Decision on Annulment) par 87

[37] *Wena v Egypt* par 22

[38] *MINE Case* (Decision on Annulment) pars 5.03-5.04

3.3.3 Failure to state reasons (article 52(1)(e))

Under article 48(3) of the ICSID Convention a tribunal is required to state reasons[39] and the failure to state reasons is grounds for annulment under article 52(1)(e). Although the provision of reasons for an arbitral or judicial decision is widely regarded as a prerequisite for the orderly administration of justice,[40] its inclusion as a mandatory requirement is not universal. The provision of reasons is thought to improve the quality of the arbitral decision and is widely regarded as a rule of international public policy. The argument against the provision of reasons is that without this requirement awards would be issued more speedily and were less subject to challenge.

International arbitration rules generally require reasons to be given for an award either always[41] or always unless otherwise agreed between the parties.[42] The codification of the requirement to state reasons does not identify the standard of the reasons to be provided or indicate how a tribunal will satisfy that standard.[43]

Annulment for the failure to state reasons in ICSID awards was interpreted in the *MINE Case*, and subsequently in *Vivendi v Argentina*[44] and *Wena v Egypt*,[45] as limited to the scrutiny of the legitimacy and integrity of the process of the decision and not extending to consider the adequacy of a tribunal's reasoning.[46] The purpose of the requirement is to explain to the reader of the award how and why the tribunal came to its decision. This is emphasised by the fact that the remedy for this ground need not be the annulment of the

---

[39] ICSID Convention, article 48(3):

> The award shall deal with every question submitted to the Tribunal, and shall state the reasons on which it is based

[40] Schreuer C, above n16, 984 par 265

[41] ICC Article 25(2); ICAC paragraph 41(1)

[42] UNCITRAL Rules Article 32(3)

[43] For a detailed discussion on the provision of and adequacy of reasons in international investment arbitration awards see Alvarez G & Reisman (eds), *The Reasons Requirement in International Investment Arbitration: Critical Case Studies*, Martinez Nijhoff Publishers, 2008

[44] *Compañía de Aguas del Aconquija S A. and Vivendi Universal S A v Argentine Republic* ICSID Case No ARB/97/3 pars 64, 65

[45] *Wena v Egypt* pars 81-83

[46] Walsh T, above n1, 453

award, but an *ad hoc* committee may itself be able to explain the reasons lacking from the original decision.[47]

There is a fine balance to this ground for annulment, because questioning the presence of a statement of reasons easily becomes a substantive test of the adequacy and correctness of those reasons, thus blurring the division between annulment and appeal.[48] *Ad hoc* committees aware of this danger have sought to carefully define the difference between grounds for annulment and a review of the legal merits of an award:

> The adequacy of the reasoning is not an appropriate standard of review under paragraph 1(e), because it almost inevitably draws an ad hoc committee into an examination of the substance of the tribunal's decision in disregard of the exclusion of the remedy of appeal by article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.
>
> In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually how it came to its conclusion, even if it made an error of fact or of law.[49]

3.4 Annulment v Finality in Arbitral Awards

There is ongoing debate about the adequacy of the current ICSID annulment provisions.[50] The perception of adequacy or otherwise of annulment provisions rests on the value placed on two conflicting principles at work in the review process: the principle of finality, and the principle of correctness. These principles are directly related to the level of review allowed. A review of process upholds the notion of finality and allows for the quick and economical settlement of disputes. In contrast, the principle of correctness is an elusive goal tied to substantive review which takes time and effort and may involve several layers of control.[51]

---

[47] *Wena v Egypt* par 83

[48] Schreuer C, above n16, 990 par 279

[49] *MINE Case* (Decision on Annulment) par 88 cited in *Wena v Egypt* par 77

[50] See generally, Knull W H & Rubins N D, above n23, 531; Franck S D, above n10; & Walsh T, above n1

[51] Schreuer C, above n16, 893 par 14

The ICSID Convention is drafted to ensure the finality of ICSID Awards. This is evident from the limited grounds of annulment and the clear distinction drawn between annulment and appeal.[52] In this way ICSID adopts the traditional approach to arbitration, promoting finality as one of its main advantages over judicial settlement. In a judicial system, cases containing legal error are theoretically controlled by courts of appeal. It is argued that the exercise of comparable control in ICSID arbitration cannot be exercised without the control becoming more damaging to the system than the decisions which provoked the appeal.[53] For this reason, errors by arbitrators in ICSID proceedings are an accepted risk and form part of the price of arbitration.[54]

Others argue that the pre-eminent goal in investment arbitration is to remove the decision making from the hands of untrustworthy domestic courts and that this, along with factors such as ease in enforceability, plays a greater role in the choice of arbitration than its final and binding nature.[55] In ICSID arbitration, where the stakes are high both in terms of money and public interest, the lack of an appeals process, potentially allowing for inconsistent or incorrect decisions, is inappropriate. Investment treaty disputes often involve major infrastructure, mining, manufacturing and other large contracts which attract international finance and participation. These projects may last for decades, involve resources vital to a state's wellbeing, and carry investments of hundreds of thousands or even thousands of millions of dollars. Although finality may be considered an advantage by some parties, when it comes at the risk of a party having to live with flawed or inconsistent awards on the same or very similar questions or facts, its appeal is greatly weakened and parties are less likely to accept these awards.[56]

---

[52] ICSID, *Report of the Secretary of State to the Administrative Council* ICSID Doc. No. AC/86/4 Oct 2 1986 Annex A cited in Redfern A, above n20, 118

[53] Feldman M B, above n2, 14

[54] Knull W H & Rubins N D, above n23, 535; Goldhaber M D, "Wanted: A World Investment Court" (2004) 1(3) July *Transnational Dispute Management*

[55] Goldhaber M D, above n54

[56] Knull W H & Rubins N D, above n23, 537

ICSID awards are often based on principles of public law and are published as public law decisions.[57] This contrasts with commercial arbitration disputes which often remain confidential and are limited to issues of private law.[58] The consideration of public international law principles by ICSID tribunals, such as the customary international law defence of necessity and BIT defences, gives ICSID awards a wider audience than the mere parties to the dispute. Therefore, the legal reasoning of ICSID awards must form part of a coherent legal jurisprudence which is accurate and correct. The lack of a substantive review of ICSID awards means that if a tribunal decides an issue incorrectly, that decision remains final and binding despite its inaccuracy.

3.4.1 Moving towards an appeal?

The debate regarding the need for a higher review for ICSID arbitral awards has become more significant as international investment arbitration has increased. Disillusionment with arbitration has been expressed in scholarly articles[59] and evidenced in headlines of business publications: "*Happy endings not guaranteed; Arbitration doesn't always live up to its Billings*";[60] "*Wanted: A World Investment Court: All-powerful global institutions may be out of fashion. But, as recent arbitration rulings show, they may be exactly what the world needs.*"[61] Dissatisfaction with ICSID's current annulment procedure is also evident in state practice.

---

[57] Griffith G, "The role of arbitrators in public law and the interface between private and public law" ICC International Arbitration Practitioner's Symposium, London, 3 July 2008

[58] ICSID Convention, article 48 concerns the publication of ICISD Awards. This provision was slightly modified on 10 April 2006. Article 48(5) provides:

> The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.

Although the entire award is not publishable without the parties consent, under this provision the legal reasoning of the tribunal will be published which assists in developing international law and transparency

[59] See generally, Franck S D, above n10; Knull W H & Rubins N D, above n23

[60] *Business Week*, 20 November 2000 cited in Knull W H & Rubins N D, above n23, 532

[61] Goldhaber M D, above n54

Investment agreements between some states have recently included provision for the development of *ad hoc* appeal mechanisms.[62] The *US Trade Act* 2002 sets out a number of objectives with respect to foreign investment, including negotiating an appellate mechanism for investment disputes under free trade agreements.[63] As a consequence US Free Trade Agreements with Chile, Singapore, the Dominican Republic, Morocco and the 2004 U.S. Model BIT include the following or similar language regarding an appellate mechanism:

> Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article ... in arbitrations commenced after they establish the appellate body or similar mechanism.[64]

The development of *ad hoc* appeal mechanisms in individual agreements is likely to fragment the dispute resolution system and fuel the inconsistent interpretation and application of investment laws. It also risks such a provision being used as a bargaining tool in negotiating bilateral investment treaties and free trade agreements, while potentially creating grounds for Most Favoured Nation ("MFN") provisions to allow for an appeal system in treaties that had not envisaged one.[65] Decisions of *ad hoc* appeal bodies may, moreover, be perceived as creating precedent and influencing case law. An unchecked system created by states on an *ad hoc* basis with no international agreement potentially presents a greater threat to the development of investment treaty law than that under ICSID.

---

[62] Organization for Cooperation of Economic Development, *Improving the System of Investor-State Dispute Settlement an Overview*, Working Papers on International Investment Number 2006/1, 9

[63] 19 U.S.C. par.3802 (b)(3)(G)(iv) cited in Organization for Cooperation of Economic Development, *Improving the System of Investor-State Dispute Settlement: an Overview*, Working Papers on International Investment Number 2006/1, 9

[64] US Model BIT 2004 at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf cited in OCED, "Improving the system of Investor-State dispute settlement: an overview" Working Papers on International Investment Number 2006/1, 9

[65] Organization for Cooperation of Economic Development, *Improving the System of Investor-State Dispute Settlement. an Overview*, Working Papers on International Investment Number 2006/1, 10. An MFN provision enables investors to profit from more favourable provisions given to nationals of third states, see Chapter 1 n22

A joint meeting between the OECD Investment Committee and ICSID debated the possibilities of an appellate mechanism in investor-state arbitration. The discussions focused on developments with respect to the creation of an appeal mechanism, and its advantages and drawbacks.[66] It was agreed that if international appellate procedures were to be introduced for investment treaty arbitrations, it would be better addressed through a single ICSID mechanism rather than by the *ad hoc* mechanisms established under emerging treaties.[67]

The ICSID Secretariat recently tabled a suggested draft for an appeals facility.[68] It envisaged an appeals panel composed of 15 persons, each from a different country, of recognised authority and with demonstrated expertise in law, international investment and investment treaties.[69] Under the proposal an award could be challenged for a clear error of law and serious errors of fact in addition to the five grounds of annulment currently set out in Article 52 of the ICSID Convention.[70]

3.4.2 Maintaining the status quo

Despite the disquiet, amendments to the ICSID Convention on April 10 2006[71] did not include an appeals facility or any changes to the current annulment procedure. The idea was rejected as premature,[72] but the ICSID Secretariat did commit to "continue to study

---

[66] Ibid, 9

[67] Ibid. See also, ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* Discussion Paper, Para 10, 22 October, 2004 at http://www.worldbank.org/icsid/highlights/improve-arb.pdf (22 July 2008); ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the ICSID Secretariat, 12 May, 2005, par 4 at http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf (22 July 2008)

[68] ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* Discussion Paper, 22 October 2004, Annexure "Possible Features of an ICSID Appeals Facility" par 5, at http://www worldbank.org/icsid/highlights/improve-arb.pdf (22 July 2008)

[69] Ibid.

[70] Ibid, par 7

[71] ICSID Convention, Regulations and Rules, April 10 2006, ICSID/15 at http://www.worldbank.org/icsid/basicdoc/CRR_English-final.pdf

[72] ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the ICSID Secretariat, 12 May, 2005, par 4 at http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf (22 July 2008)

such issues to assist member countries when and if it is decided to proceed towards the establishment of an ICSID appeal mechanism".[73]

Perhaps the main issue is whether an appeals facility has the support of the Contracting States to the ICSID Convention. The rejection of an appeals facility in the 2006 amendments, coupled with the notoriously slow progress by international working committees in amending international agreements,[74] suggests that unless and until dissatisfaction with the established regime has an emerging groundswell of support that threatens its continued existence, it is improbable that states will agree to substitute an appeals procedure for the limited grounds of annulment in article 52.[75] For that to occur, the correctness and accuracy of ICSID awards would need to be seriously called into question. In addition, those inaccuracies would need to be experienced by all Contracting States, particularly the more powerful states, thus tipping the balance of ICISD arbitration away from finality to accuracy.

3.5 Annulment Proceedings in the Argentine Cases

The lack of a substantive review for ICSID awards explicitly means that demonstrably wrong decisions remain un-reviewable for legal error.[76] Acknowledging ICSID's limited jurisprudence, it should be recognized that incorrect awards is not a common criticism of ICSID. In fact, only one ICSID award is often cited for its alleged incorrectness, *SGC v Pakistan.*[77]

---

[73] Ibid

[74] The lack of agreement by the Working Committee at UNCITRAL over the last decade in agreeing to an amended definition of "agreement in writing" for the UNCITRAL Model law is cited as an example of this slow process in Griffith G, "Investment Awards: Annulment Enforcement and Appeals" *BIICL Investment Treaty Forum*, May 9 2008

[75] Ibid.

[76] Ibid.

[77] *SGC Société Générale de Surveillance S A v Islamic Republic of Pakistan* ICSID Case No ARB/01/13 and *SGS Société Générale de Surveillance S.A v Republic of Philippines* ICSID Case No ARB/02/6. This may be in part due to the limited jurisprudence under ICSID.

Argentina has applied for annulment in all awards thus far in the Argentine Cases[78] and has signaled its intention to apply for the annulment of any further adverse awards rendered against it in the Argentine Cases.[79] The *CMS Annulment Decision* is the only annulment decision to date, and it identifies a number of significant alleged errors in the tribunal's reasoning. This exposes the failings of the ICSID annulment procedure when faced with an incorrect award.

3.5.1 *CMS Annulment Decision*

Argentina requested the annulment of the *CMS Award* pursuant to article 52 of the ICSID Convention and argued that the tribunal manifestly exceeded its powers and/or failed to state the reasons on which it was based. The *ad hoc* committee made its decision in accordance with the strict limitations of article 52, refusing to annul the award on all but one of the grounds claimed by Argentina.

The decision brings the debate over the adequacy of ICSID's annulment provisions into the spotlight. It is not the substantive part of the decision which generates this debate; the annulment provisions were applied restrictively and in accordance with previous interpretation and current literature. Rather, it is the committee's *obiter dicta* remarks which cause concern. The committee used the annulment forum to identify legal errors in the *CMS Award* which did not fall within the grounds for annulment. The significance of the identified errors was substantial and could, according to the committee, "have a decisive impact on the operative part of the award"[80]. Yet, as the committee was constrained by the limited procedural grounds of annulment under the ICSID Convention, it refused to annul the sections of the award infected by error. The result is that Argentina remains bound by the award.

---

[78] *CMS Annulment Decision*; *Azurix Corp v Argentina* ICSID Case No ARB/01/1; *Enron Corporation and Ponderosa Assets, P L v Argentina* ICSID Case No ARB/01/3; *Sempra Energy Internacional v Argentina* ICSID Case No ARB/02/16; *LG&E v Argentina* ICSID Case No ARB/02/1

[79] Griffith G, above n74

[80] *CMS Annulment Decision* par 135

3.5.2 The tribunal manifestly exceeded its powers

The first ground for annulment claimed by Argentina is that the tribunal manifestly exceeded its powers, so that the award should be annulled in whole or in part under article 52(1)(b).

a) *Jus standi,* jurisdiction, and manifest excess of power

Argentina claimed that the tribunal manifestly exceeded its powers by: (1) exercising jurisdiction over claims by a company's shareholder for income lost by the company;[81] and (2) authorising CMS, which was not a party nor even mentioned in any of the applicable instruments, to claim a breach of obligations under the umbrella clause.[82] The claims were based on arguments that CMS as a shareholder had no standing to bring claims in its own right but that any claims belonged to the parent company, TGN. It follows that if CMS lacked standing to bring the action, the tribunal had exceeded its powers by exercising jurisdiction over the dispute.

It is established that an arbitral tribunal's lack of jurisdiction, whether partial or total, comes within the scope of an "excess of powers" under article 52(1)(b).[83] In assessing this ground of annulment, the *ad hoc* committee recalled that the applicable jurisdictional provisions are those of the ICSID Convention and the relevant BIT. It disregarded national laws as irrelevant to the question of standing and jurisdiction and added that:

> Nothing in general international law prohibits the conclusion of treaties allowing "claims by shareholder independently from those of the corporation concerned...even if those shareholders are minority or non-controlling shareholder"[84]

Jurisdiction of ICSID is determined by article 25, which relevantly provides:

---

[81] *CMS Annulment Decision* pars 46-48

[82] The committee did not consider whether the award should be annulled for excess of powers on this ground because it annulled this section of the award for failure to state reasons under article 52 (1)(e). See, *CMS Annulment Decision* par 97

[83] *KlocknerIndustrie-Anlagen GmbH and others* v *United Republic of Cameroon & Société Camerounaise des Engrais* ICSID Case No ARB/81/2 (Decision on Annulment) par 4

[84] *CMS Annulment Decision* par 69 citing *CMS v Argentina* (Decision on Jurisdiction) par 48

> The jurisdiction of the Centre shall extend to any legal dispute arising out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.[85]

The *ad hoc* committee turned to the tribunal's consideration of the terms of Argentina-US BIT as the relevant instrument expressing the parties' consent to ICSID arbitration and as providing the definition of investment. Article 1(1) of the Argentina-US BIT defines "investment" as:

> (a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:
>
> ...
>
> (ii) A company or shares of stocks or other interests in a company or interest in the assets thereof
>
> ...[86]

The committee saw the definition as compatible with the object and purpose of the ICSID Convention and indicated that "investments made by minority shareholders are covered by the actual language of the definition, and also recognized by ICSID arbitral tribunals in comparable cases".[87] CMS made a capital investment in TGN covered by the BIT and asserted causes of action under the BIT in connection with that protected investment. On this basis the committee confirmed that CMS must be considered an investor within the meaning of the BIT and thus under the ICISD Convention. The committee concluded that the tribunal had not exceeded its powers by deciding that CMS had standing before ICSID and for exercising jurisdiction over its claims for breaches of the US-Argentina BIT.[88]

---

[85] ICSID Convention article 25, See full text above n34

[86] US-Argentina BIT, see full text at Appendix 4

[87] *CMS Annulment Decision* par 73

[88] *CMS Annulment Decision* par 75

b) Non application or erroneous application of the proper law

Argentina also argued that the tribunal manifestly exceeded its powers by failing to apply the proper law to the dispute. This ground of annulment was claimed in relation to various aspects of the award: failing to give effect to the treaty article XI; rejecting Argentina's defence of necessity under customary international law; failing to apply the governing law; transforming the "fair and equitable" and "umbrella" clauses into strict liability provisions and by not determining the ordinary meaning of the terms "fair and equitable".

The failure to apply the proper law to arbitration has been held to constitute a manifest excess of power and therefore ground for annulment.[89] There is an important distinction between failure to apply the law and error in its application, and the *ad hoc* committee were mindful of this distinction when considering Argentina's submissions.[90]

(i) Necessity

Argentina pleaded its defence against CMS's claims on two grounds: the defence of necessity under Article XI of the BIT, and on the doctrine of necessity at customary international law.[91] In its application for annulment Argentina claimed that the tribunal's failure to distinguish between the application of the Treaty Defence from the defence of necessity at customary international law and the tribunal's failure to correctly interpret the defence constituted a manifest excess of power.

Although the committee identified a series of errors and *lacuna* in the tribunal's application of the defence, it recalled its limited jurisdiction under article 52 of the ICSID Convention and restricted its power to annul awards to the express grounds provided. Ultimately holding that:

---

[89] *KlocknerIndustrie-Anlagen GmbH and others* v *United Republic of Cameroon & Société Camerounaise des Engrais* ICSID Case No ARB/81/2 (Decision on Annulment) 118; *Amco Award* (Decision on Annulment) par 515, and *MINE Case* (Decision on Annulment) par 87

[90] *CMS Annulment Decision* par 52

[91] See generally, Chapter 2

> although applying [the law] cryptically and defectively, it applied it. There is accordingly no manifest excess of powers.[92]

The committee emphasized the difference between exercising its powers of annulment and conducting an appeal on the merits, stating that "if the committee was acting as a court of appeal it would have to reconsider the Award in this ground".[93]

(ii) Compensation

In relation to compensation following the establishment of the defence of necessity[94] the committee held that the tribunal's comments were *obiter dicta* and had no bearing on the operative part of the award. These statements could therefore not constitute a manifest excess of power.[95]

(iii) Fair and equitable treatment

Argentina contended that the tribunal transformed the umbrella clause and the "fair and equitable treatment" provisions into strict liability clauses.[96] In regards to "fair and equitable treatment" the committee held that the tribunal had evaluated the challenged measures in light of the circumstances and did not transform the clause into a strict liability clause.[97] The committee implied its disagreement with the tribunal's holdings on this ground by emphasizing that it is not an appeal body:

> The Committee has no jurisdiction to control the interpretation thus given by the tribunal to that Article, still less to reconsider its evaluation of the facts. It is sufficient for the Committee to hold that the Tribunal did not manifestly exceed its powers.[98]

---

[92] *CMS Annulment Decision* par 136

[93] *CMS Annulment Decision* par 135

[94] See above 2.4.1(d)

[95] *CMS Annulment Decision* par 144-150

[96] Again the committee did not discuss the arguments in relation to the umbrella clause because it annulled this section of the award for failure to state reasons under article 52 (1)(e). See below 3.5.3

[97] *CMS Annulment Decision* par 85

[98] *CMS Annulment Decision* par 85 (footnotes omitted)

3.5.3 The award has failed to state the reasons on which it is based

The requirement to state reasons is based on the tribunal's duty to identify and communicate the factual and legal premises leading the tribunal to its decision. If these reasons are not given, there is room for a request for annulment under Article 52(1)(e).[99] Argentina argued that the *CMS Award* should be annulled for failure to state the reasons in relation to: (1) its decision on jurisdiction; (2) Argentina's defence under the BIT and at customary international law; (3) its calculation of damages; (4) and the umbrella clause.

In relation to Argentina's defence and the calculation of damages, the committee undertook a careful examination of the tribunal's reasons.[100] It concluded that although the tribunal should have been more explicit in its reasoning,[101] both parties had understood the award and "a careful reader can follow the implicit reasoning of the tribunal".[102] Although agreeing that the reasoning contained some gaps and even some errors, the *CMS Annulment Decision* emphasised that the correctness of the reasoning is not under examination:

> It is sufficient to note that the Tribunal did – step by step and methodically, whether rightly or wrongly – interpret and apply Article XI.[103]

Argentina's application for annulment was successful on one ground. The committee annulled the tribunal's findings for liability under the umbrella clause of the BIT on the grounds that it failed to state reasons. In reaching this conclusion the committee was careful to examine the tribunals' reasons on a step by step basis and to consider a number of possible interpretations before concluding:

> ... it is quite unclear how the Tribunal arrived at its conclusion...which makes it impossible for the reader to follow the reasoning on this point. It is not the case that

---

[99] *Wena v Egypt* par 79

[100] *CMS Annulment Decision* par 120-127

[101] *CMS Annulment Decision* par 125

[102] *CMS Annulment Decision* par 127

[103] *CMS Annulment Decision* par 118

> answers to the questions raised can be reasonably inferred from the terms used in the decision; they cannot.[104]

The decision provides some guidance as to the level of reasoning required by an ICSID tribunal. However, the victory was a hollow one for Argentina. The umbrella clause added nothing to the overall treaty obligations as damages were awarded on alternate grounds. As a result, the annulment of this part of the award had no effect on the amount of damages awarded to CMS.

3.5.4 An indirect review

The *CMS Annulment Decision* contains frequent reference to the limited mandate of the ICSID Convention annulment provisions and to the committee's lack of power to review the *CMS Award* for errors of law or fact:

> the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by article 52 of the ICSID Convention...in these circumstances the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the tribunal...[105]

And further

> The Committee has no jurisdiction to consider whether in doing so, the Tribunal made any error of fact or law.[106]

Although cognisant of its limitations, in an interesting twist the committee contradicted itself by entering into a detailed consideration of errors of law made by the tribunal. The committee took the opportunity to analyse what it expressly acknowledged it had no power to change, the substance of the award. In so doing, it overstepped its mandate and inappropriately used the annulment forum.

The focus of this indirect review was on the application of the Treaty Defence and the defence of necessity at customary international law. On these issues the committee identified a number of errors and *lacuna* in the tribunal's interpretation. It did this despite

---

[104] *CMS Annulment Decision* par 97

[105] *CMS Annulment Decision* par 158

[106] *CMS Annulment Decision* par 121, see also pars 41, 43, 45 & 136

a lack of power to enforce its interpretation of the issues in question. The value and effect of this aspect of the *CMS Annulment Decision* warrants consideration.

a) A tool to shape the law

As the first annulment decision in the Argentine Cases, the decision provides a clarification on the interpretation of the two grounds of necessity central to the Argentine Cases. Recognizing its inability to enforce its interpretation, it appears that the committee used the annulment forum as a tool to shape the law and influence the remaining Argentine Cases:

> As Argentine [sic] noted, the present arbitration was the first in a long series relating to the Argentine crisis of 2001-2002. Accordingly the Committee will seek to clarify certain points of substance on which, in its view, the Tribunal made manifest errors of law.[107]

In this way, the adoption of the reasoning in the *CMS Annulment Decision* by future tribunals may prevent the repetition of inconsistent interpretations seen in the early Argentine Cases. A clear and correct interpretation of legal principles may also slow the flow of annulment applications in the Argentine Cases. Although the committee may be regarded as having overstepped its boundaries, the failure to identify errors in the *CMS Award* could have been interpreted as a "rubber stamp" to the decision approving the use of the *CMS Award* as a precedent in future cases. The implications of this would be magnified by the fact that the *CMS Award* sets the stage for over 40 arbitrations against Argentina with virtually identical facts.

The influence the committee's "clarifying comments" is likely to have on the defence of necessity in the remaining Argentine Cases is limited. Firstly, the structure of the annulment mechanism means the statements are *obiter dicta*. Secondly, the strength of the *obiter dicta* statements is limited by the absence of a system of binding precedent under ICSID. In this regard the *ad hoc* committee's own lack of reference to other decisions, including the *LG&E Award*, weakens the strength of any persuasive authority

[107] *CMS Annulment Decision* par 45

the decision may have.[108] Thirdly, the committee's decision forms part of annulment proceedings. This means that the committee was not presented with the necessary evidence and facts to undertake a merits review. Instead the *CMS Annulment Decision* was based on submissions by the parties intended to sustain or defend an annulment application on the limited grounds provided under article 52. This risks the committee's interpretation being incomplete or even incorrect.

b) Politically unenforceable

The decision by the annulment committee to highlight errors in the *CMS Award* which, in the words of the committee, "could have had a decisive impact on the operative part of the award"[109] makes compliance with the award by Argentina politically difficult. Argentina is faced with a final binding decision which has been acknowledged as incorrect by three independent legal experts appointed by the same body which requires it to comply with the awards obligations.[110] Argentina's motivation to comply with the award in these circumstances has been undermined. On this point, the *CMS Annulment Decision* may help justify and ease the political consequences of non-compliance by Argentina.[111]

c) Underlining the inadequacy of the annulment mechanism

The *CMS Annulment Decision* confirms that some of Argentina's criticism and its dissatisfaction with the *CMS Award* are justified, albeit being beyond the grounds of annulment under article 52. The use of the annulment forum to provide an indirect legal review of the *CMS Award* and to clarify the interpretation of international law principles provides a salient example of the limitations of ICSID's annulment procedures and

---

[108] For example, the committee's comments in relation to compensation at par 146: "article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period" are directly supported by the *LG&E Award* par 266

[109] *CMS Annulment Decision* par 135

[110] The members of the *ad hoc* committee in *CMS Annulment Decision* were. Judge Gilbert Guillaume (President); Judge Nabil Elaraby; and Professor James Crawford

[111] See 4.2.1(b) for a discussion on the consequences of non-compliance with ICSID awards

strengthens calls to review the ICSID annulment provisions. The *CMS Annulment Decision* has exposed a demand for "greater coherence and consistency in the case law emerging under investment treaties"[112] and the need for a forum where this can be ensured.

3.6 Conclusion

As the *CMS Annulment Decision* did not annul parts of the *CMS Award* which it recognized as containing legal errors, Argentina is now bound to comply with an incorrect award. The similarities in the reasoning in the *Sempra* and *Enron Awards* means this result may be repeated in their annulment proceedings.[113]

The open criticism of the tribunal's reasoning in the *CMS Annulment Decision* exposes a weakness in the ICSID review mechanism. The perception that ICSID requires parties to accept and be bound by a legally incorrect award may well generate dissatisfaction with ICSID, and cause parties to question the adequacy of the ICSID award review mechanisms.

Whether the Argentine Cases will provide the impetus for a change to the annulment mechanism will depend on the level of exposure powerful states perceive themselves to have to incorrect awards. Although the Argentine Cases present a significant body of case law under ICSID, Argentina is only one state. Being a developing state also limits the influence of the cases, because a developing state's role in ICSID proceedings is more likely to be as a defendant host state than a home state to an investor. While statistics show that state/investor success rates are equal under ICSID proceedings,[114] the likelihood of repeated proceedings are more likely to be instituted against a defendant host state.

---

[112] Walsh T, above n1, 458

[113] See above chapter 2, n125

[114] Ex Secretary-General of ICSID Roberto Dañino stated that outcomes of ICSID arbitrations are equally divided, almost exactly 50/50 in awards for investors and for States: Dañino R, Opening Remarks of the OECD/ICSID/UNCTAD SYMPOSIUM *Making the most of International Investment Agreements a Common Agenda* Paris, France, 12 December 2005, 3

In order for powerful home states to perceive adverse ICSID decisions as a significant risk, they would need to anticipate adverse ICSID decisions being made against their investors,[115] or even against themselves as defendants. This scenario is increasingly more likely; for example, the introduction of carbon emissions trading legislation in State A effecting State B's investment in State A could, if in breach of BIT obligations, trigger the institution of ICISD proceedings. Until powerful states are exposed to negative rulings under ICSID, the likelihood of a change to annulment provisions is unlikely. The Argentine Cases may nonetheless contribute to changing state attitudes and may influence a long term change. In the short term, the *CMS Annulment Decision* serves as a warning to tribunals to provide coherent and consistent legal reasoning.

Having considered the reasoning of awards in chapter 2, followed by an analysis of the grounds for reviewing awards in this chapter, the thesis now turns to the question of compliance with awards in the Argentine Cases. The next chapter considers Argentina's resistance to complying with its obligations under ICSID awards in the Argentine Cases.

[115] Walsh T, above n1, 444

Chapter 4

Compliance with ICSID Awards in the Argentine Cases

4.1 Introduction

The previous two chapters have examined the ICSID awards and annulment decisions handed down in the Argentine Cases. Despite the issues identified in those chapters, Argentina is now bound by a final award in *CMS v Argentina*. ICSID proceedings, however, have been met with severe criticism from Argentine government officials and legal commentators. Challenges have been made to ICSID arbitration on a number of levels, from Argentina's obligations to comply with awards, to the ICSID Convention's constitutionality under the Argentine Constitution. The avoidance of obligations under ICSID awards will likely have repercussions beyond the Argentine Cases, setting a precedent of non-compliance in ICSID arbitration and potentially weakening the appeal of the system to its users.

This chapter considers the strength of Argentina's challenges to compliance with ICSID Awards against the mechanisms for compliance, recognition and enforcement provided by the ICSID Convention. It also assesses the validity of challenges to the ICSID Convention under the Argentine Constitution. The chapter aims to assess the impact of Argentina's response on the remaining Argentine Cases and the broader implications of its response on investment treaty arbitration under ICSID.

The chapter begins by providing the framework for the compliance, recognition and enforcement of awards under ICSID. Against this framework it outlines Argentina's potential challenges to compliance with ICSID Awards, beginning with an analysis of challenges made within the rules of the ICSID Convention, before considering challenges developed outside the ICSID Convention's framework, including the Convention's constitutionality and the potential for a review of ICSID Awards by Argentine courts. Finally, the chapter considers how Argentina's response to ICSID Awards in the

Argentine Cases may affect its position in relation to future investment, as well as considering the effects it may have on ICSID arbitration.

4.2 Compliance, Recognition and Enforcement under ICSID

Recognition and enforcement of ICSID Awards is dealt with under Section 6, Chapter IV of the ICSID Convention, which addresses the effects of a final award on the parties to the arbitration (article 53), recognition and enforcement of an award (article 54) and immunity of a foreign state from execution (article 55). The successful party in ICSID proceedings may either be a state or a private party.[1] In view of Argentina's role as the respondent in the Argentine Cases, this chapter concentrates on issues surrounding the state party as the unsuccessful respondent, the award debtor.

4.2.1 Binding nature of awards under article 53

a) Obligation of compliance

Once an ICSID award is rendered, the parties have an international law duty under the articles of the ICSID Convention to comply with it. The legal basis of this duty is provided in article 53:

> (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
> (2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 53 establishes the finality of the award and the self-contained nature of the ICSID review system. An award, once rendered, may not be subject to review outside the

[1] Ex Secretary-General of ICSID Roberto Dañino stated that outcomes of ICSID arbitrations are equally divided, almost exactly 50/50 in awards for investors and for States: Dañino R, "Opening Remarks of the OECD/ICSID/UNCTAD SYMPOSIUM" *Making the most of International Investment Agreements: a Common Agenda*, Paris, France, 12 December 2005, 3

measures provided for in the ICSID Convention.[2] Each party is bound by the obligation to "abide by and comply" with the terms of the final award, except where enforcement has been stayed under the ICSID Convention article 52(5).[3]

The self-contained nature of the ICSID arbitration is one of its distinctive features and provides it with a clear advantage over other arbitration mechanisms.[4] This feature is supported by article 26 of the ICSID Convention:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to **the exclusion of any other remedy.** A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention. [5]

The exclusion of any remedy outside the ICSID Convention protects ICSID awards from attack or review from local courts.[6] A Contracting State's court is obliged to dismiss an action that seeks the annulment or any other form of review of an ICSID award outside of those permitted by the ICSID Convention.[7]

In addition to the obligation of compliance under article 53, article 54(1) imposes an obligation on each Contracting State (regardless of whether or not it is a party to the

---

[2] The relationship of article 53 to the Convention's system of review is summarized in: ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) 4 ILM 524, par 41:

> Article 53 declares that the parties are bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention. The remedies provided for are revision (Article 51) and annulment (Article 52). In addition, a party may ask a Tribunal which had omitted to decide any question submitted to it, to supplement its award (Article 49(2)) and may request interpretation of the award (Article 50).

[3] ICSID Convention, article 52(5):

> The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

[4] Awards made under other arbitration systems including ICC or UNCITRAL are potentially subject to review procedures by courts in the arbitration or the enforcement forum. Schreuer C, *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge, 2001, 1083. See, above 3.2

[5] ICSID Convention, article 26 (author's emphasis)

[6] *MINE Case* par 84 cited in Schreuer C, above n4, 1084 par 19

[7] Amerasinghe C F, "Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes" 1973/4, 5 *Journal of Maritime Law and Commerce* 211, 244/5 cited in Schreuer C, above n4, 1084 par 16

particular proceedings) to recognise an ICSID award and to enforce the monetary obligations of that award:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgement of the courts of a constituent state.[8]

Enforcement proceedings under article 54 are not a required step in compliance with an ICSID award because the obligation to comply with an award exists under article 53.[9] Article 54(1) provides a legal safeguard in the event that a party fails to comply with pecuniary obligations of an award under article 53. The limitation of article 54's application to the "pecuniary obligations", and not to all orders of the tribunal, supports this interpretation.[10]

The requirement to cease diplomatic protection unless a Contracting State has failed to "abide by and comply with" an award under article 27 of the ICSID Convention also supports the interpretation of article 54 as a safeguard to non-compliance.[11] Article 27 of the ICISD Convention repeats the language "abide by and comply with" from article 53, implying that failure to comply with obligations under article 53 is the point at which diplomatic protection is reintroduced. This protection can be used concurrently with enforcement proceedings under article 54.[12]

---

[8] ICSID Convention, article 54(1). See full text below, 4.2.2

[9] Prof. Dr. Tawil G, Speaker (Commentator) "The Enforcement of Investment Treaty Awards· Getting to Judgement" Working Group A: Arbitration Treaties/ Treaty Arbitration, *The International Council for Commercial Arbitration*, 8-10 June 2008, Dublin

[10] Ibid.

[11] ICSID Convention, article 27:

> (1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

[12] Schreuer C, above n4, 1103 par 11

During the negotiation of the ICSID Convention there was a general expectation that non-compliance by states would not be a practical problem and that voluntary compliance would be a natural consequence of a Contracting State's obligations under article 53.[13] The chair of the consultative sessions regularly expressed the view that Contracting States would honour an ICSID award without the need for further litigation.[14] The fact that compliance with awards in accordance with article 53 (hereinafter "direct compliance") has been the norm in ICSID Arbitration confirms this interpretation.[15]

b) Consequences of non-compliance

Direct compliance with an ICSID award is encouraged by a range of legal and non-legal factors. Primarily, the losing party has a public international law duty, by way of treaty obligation, to comply with an award.[16] Obligations under the ICSID Convention and respective BITs are reinforced by the most fundamental principle of international treaty law, *pacta sunt servanda*. The whole point of making a binding agreement is that each party should be able to rely on its performance by the other party.[17]

Direct compliance with ICSID awards is encouraged by the possibility of two types of legal action. The first is enforcement proceedings under article 54,[18] the second is ICJ proceedings under article 64.[19] The result of successful proceedings in the ICJ would be a judgment finding the state in violation of article 53 of the ICSID Convention.[20]

---

[13] Ibid, 1188 par 32

[14] A Broches was Chair of the Consultative Sessions referred to by Prof. Dr. Tawil G, Speaker (Commentator) "The Enforcement of Investment Treaty Awards: Getting to Judgement" above n9

[15] Boralessa A, "Enforcement in the United States and United Kingdom of ICSID Awards Against The Republic of Argentina: Obstacles that Transnational Corporations May Face" (2004)17 *New York International Law Review* 53, 66; Baldwin E, Kantor M & Nolan M, "Limits to Enforcement of ICSID Awards"(2006) 23(1) *Journal of International Arbitration* 1, 5-6 state that they are only aware of four cases involving decisions as to judicial enforcement of ICSID awards under article 54 of the ICSID Convention.

[16] ICSID Convention, article 53

[17] The Vienna Convention restates this principle at article 26, which reads: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". See above Chapter 2 n10 & 11 and accompanying text.

[18] This remedy is available against either a state party or an investor; see below 4.2.2b)

[19] This remedy is only available against a State party; ICSID Convention, article 64 provides:

Parallel to the institution of proceedings is the re-emergence of diplomatic protection from the creditor state under article 27 of the ICSID Convention, which may compel a state to comply with an award.[21] Diplomatic protection may involve countermeasures, such as withholding payments due to the debtor state, the freezing of assets, or the referral of the dispute to the ICJ. The advantages of diplomatic protection are, however, limited by a number of political elements, including: the willingness of the investor's state to become involved in the dispute; the relationship between the investor and its home state and the power the aggrieved investor may have to drive that state to negotiate on its behalf; and the relationship between the Contracting States and the level of influence or power the claimant's state has to negotiate with the other.

In addition to legal pressures, a number of non-legal factors influence compliance. The need for foreign investment creates strong pressure on states to comply with ICSID awards; in this sense, direct compliance provides evidence of a stable investment climate and affects a state's standing in the international business community.[22] While an increase in competition among states to attract foreign investment and a weak economy may increase this pressure, a state's risk profile from the point of view of a foreign investor will only be one factor in the business decision making.[23] ICSID's status as part

---

> Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

[20] Schreuer C, above n4, 1089 par 37

[21] ICSID Convention, article 27:

> (1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
>
> (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

[22] History of the Convention Vol. II pp.273, 425, 428, 430 cited in Schreuer C, above n4, 1088 par 32

[23] Von Moltke K & Mann H, *Towards a Southern Agenda on International Investment: Discussion Paper on the Role of International Investment Agreements* International Institute for Sustainable Development, May 2004, 4 at http://www.iisd.org/pdf/2004/investment_sai.pdf (2 October 2008)

of the World Bank Group and state concerns about future loans is also often cited as a motivating factor in compliance with ICSID awards.[24]

4.2.2 Recognition and enforcement under the ICSID Convention

In the event that an award debtor fails to directly comply with its obligation to abide by and comply with an award, article 54 of the ICSID Convention provides for recognition and enforcement of ICSID awards by the courts of all Contracting States. It also provides for certain procedural directions relating to this general obligation:

> Article 54:
>
> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgement of the courts of a constituent state.
>
> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
>
> (3) Execution of the award shall be governed by the laws concerning the execution of judgements in force in the state in whose territories such execution is sought.

The obligation to recognise and enforce an award applies to all Contracting States, and recognition and enforcement may be sought in any Contracting State, including the state party to the arbitration or the state of the investor. A party seeking recognition and enforcement has the possibility to choose the forum most appropriate for this purpose, a choice determined primarily by the availability of assets suitable for execution.[25]

---

[24] The Secretary General of ICSID, who is also usually the World Bank's general counsel, has communicated with recalcitrant parties reminding them of their obligations to comply with awards: Peterson L, "Arbitration- striking a difficult balance" *Foreign Direct Investment*: London, 1 April 2006; see also, Schreuer C, above n4, 1088 par 33

[25] Considerations of sovereign immunity from execution will also be relevant. See below 4.2.2c)

a) Recognition

Recognition of an award simply involves a domestic court recognising an award as binding or *res judicata.*[26] Recognition under the ICSID Convention constitutes the ultimate phase of the arbitral process and the state is deemed to have waived any defence, including immunity, from the jurisdiction of the recognising court on the basis that this would be inconsistent with the consent given by that state to ICSID arbitration.[27] The ICSID Convention deprives state courts or authorities of any discretion in this matter; ICSID awards are binding and must be recognized in all Contracting States.[28] Recognition is the preliminary step to enforcement and establishes the legal nature of the award in the domestic legal system, providing the basis for enforcement.[29]

b) Enforcement

Like other international bodies, ICSID lacks the power to enforce its own binding awards. Absent direct compliance by the award debtor, it depends on national courts to enforce its awards.[30] The self-contained nature of the ICSID awards extends to enforcement and an award must be enforced "...as if it were a final judgement of a court in that State". A domestic court or authority before which execution is sought may not re-examine the merits of an award, nor may it examine the fairness or propriety of the proceedings.[31]

---

[26] *Res judicata* means matter already judged, it is used in both civil law and common law legal systems, to refer to a case in which there has been a final judgment and that is no longer subject to appeal.

[27] Delaume G, Highet K & Kahale G III, "France- Recognition of ICSID Awards – Sovereign Immunity" (1992) *American Journal of International Law*, 139

[28] Ibid.

[29] The author will use the terms enforcement and execution interchangeably as is done in the Convention. See the discussion regarding the use of "execution and enforcement" in Schreuer C, above n4, 1088 pars 61-68

[30] Boralessa A, "Enforcement in the United States and United Kingdom of ICSID Awards Against The Republic of Argentina: Obstacles that Transnational Corporations May Face"(2004) 17 *New York International Law Review* 53, 64

[31] Schreuer C, *The ICSID Convention A Commentary* Cambridge University Press, Cambridge, 2001, 1127 par 75

This contrasts with enforcement of non-ICSID awards which may, depending on the particular rules, be reviewed under domestic law and applicable treaties.[32]

A public policy defence was expressly ruled out as a defence under the ICSID Convention during drafting. It was defeated on the ground that the exception would have to be granted to all states, including that which was party to the dispute, which would in turn damage the binding nature of the award.[33] The existence of reviewable features of other non-ICSID awards and the rejection of these elements during the ICSID Convention's preparation[34] support the interpretation that domestic authorities charged with enforcement under article 54 have no discretion to review the award.

The failure of a Contracting State to recognise and enforce an award would put it in breach of its treaty obligations and carries with it the consequences of state responsibility, including diplomatic protection and the right of the investor's state to refer the dispute to the ICJ under article 64.[35] If recognition and enforcement proceedings are unsuccessfully brought in the court or authority of the state which is party to the proceedings, that state would be in breach of two obligations: article 53 to abide by and comply with the award; and article 54 to recognise and enforce the award.

c) Sovereign immunity from execution

The simple recognition process is not intended to interfere with rules of sovereign immunity when execution of an award is sought. Under article 55 of the ICSID Convention the laws relating to state immunity from execution in the forum that enforcement is sought are applicable.

---

[32] Notable is the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 (*New York Convention*) which provides a number of grounds on which enforcement of an award may be refused, including if contrary to local public policy. See above 3.2

[33] Boralessa A, above n15, 74

[34] Schreuer C, above n4, 1128 par 70

[35] Ibid, 1110 par 28

> Article 55:
> Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution.

Sovereign immunity is a plea against the jurisdiction of the court; it has nothing to do with the merits of the dispute.[36] A state pleading sovereign immunity argues that a court must withhold its jurisdiction on the basis that jurisdiction cannot be assumed over a sovereign state. The doctrine of sovereign immunity has developed to reflect the changing role of the state in the international community and its increasing subjection to the rule of law. The doctrine has moved from a doctrine of absolute immunity, which was an absolute bar to jurisdiction by domestic courts against foreign sovereigns, to a lesser standard of restrictive immunity which permits courts to exercise jurisdiction over certain commercial acts of states.[37]

In 2004 the UN General Assembly adopted the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (UN Convention on State Immunity).[38] The convention is based on the doctrine of restrictive immunity, and while the rules and the exceptions set out in the convention are broadly recognised in state practise the UN Convention of State Immunity has not been ratified by all states, and thus it is still necessary to when ascertaining the current law relating to state immunity to construe the provisions of the convention by reference to the extent to which they are supported by state practise as evidenced in legislation and case law of relevant jurisdictions.[39]

---

[36] Sornarajah M, *The Settlement of Foreign Investment Disputes*, Kluwer Law International, The Netherlands, 2000, 291

[37] Fox H, "International Law and restraints on the exercise of jurisdiction by national courts of states" in Evans M D (ed), above n17, 364. Not all states have moved towards a doctrine of restrictive immunity; China and Vietnam for example still adhere to a preference for absolute immunity: Sornarajah M, above n36, 292

[38] available at http://untreaty.un.org/English/Notpubl/English_3_13.Pdf (19 July 2009)

[39] Fox H, "International Law and restraints on the exercise of jurisdiction by national courts of states" in Evans M D (ed), above n17, 368. State immunity is the subject of legislation in many states including the *State Immunity Act* 1978 (UK); *Foreign Sovereign Immunities Act* 1976 (USA); *Foreign States Immunities Act* 1985 (Australia). The purpose here however is to identify the doctrine of sovereign immunity as a potential hurdle to enforcement of awards in the Argentine Cases, not to discuss the detailed application of any particular state's sovereign immunity laws. For a detailed study on the laws of state immunity see Fox H, *The Law of State Immunity,* 2nd Edition, Oxford University Press, Oxford, 2008

An ICSID award can only be executed against assets that are not protected by sovereign immunity from execution.[40] State property, which is recognised as in use for sovereign purposes such as diplomatic and military property and the property of central banks, is generally immune from seizure.[41] Other requirements may include that executable assets are for commercial as opposed to official use, while some states require a specific link between the underlying claim and the property that is subject to execution.[42]

Sovereign immunity is a procedural bar to execution and has no bearing on the award itself.[43] It does not relieve a state of its obligations under the ICSID Convention, including its obligation to comply with the terms of the award under article 53(1). The right to bring further enforcement proceedings in another Contracting State is also not lost, although a cost/benefit analysis of further proceedings may mean that further enforcement proceedings are not pursued. For example, a German investor prevented from enforcing an award in Canada on grounds of sovereign immunity is still able to seek enforcement of that award in another jurisdiction such as Australia.

4.2.3 Complying with ICSID Award obligations in the Argentine Cases

A final award in ICSID arbitration proceedings is binding on the parties and must be complied with in accordance with obligations under article 53. In the event an award debtor fails to directly comply with an award, the award creditor may institute recognition and enforcement proceedings under article 54 and may also, or alternatively, seek diplomatic protection under article 27. While on its face obtaining compliance with an ICSID award is straightforward, in the Argentine Cases compliance is far from certain.

---

[40] ICSID Convention, article 55

[41] Fox H, "International Law and restraints on the exercise of jurisdiction by national courts of states" in Evans M D (ed), above n17, 381

[42] Ibid.

[43] Ibid, 370 For a recent decision on the scope of immunity in the context of an ICSID award see *AIG Capital Partners Inc and another v Republic of Kazakhstan (National Bank of Kazakhstan intervening)*[2005] EWHC 2239 (Comm)[2006] 1 All ER

There has been wide ranging debate regarding how Argentina should and will respond to awards rendered in the Argentine Cases. The legal grounds for non-compliance have been debated by academics, practitioners and government representatives.[44] Despite the rhetoric, the Argentine government has not formally denounced or restricted its consent to the ICSID Convention[45] and at the time of writing the *CMS Award* is the only final award in the Argentine Cases which has not been complied with. Potential challenges to the awards can be addressed in two categories: the avoidance of obligations using the rules of the ICSID Convention; and the avoidance of obligations based on arguments external to the ICSID Convention.

---

[44] Rosatti H, "Los tratados bilaterales de inversión, el arbitraje internacional obligatorio y el sistema constitucional argentino" *La Ley* 2003-F, 1283; Rosatti H D, "Globalization, Statism and Law (Argentina and ICSID)" (translation) (2004) 2(3) *Transnational Dispute Management*; Perotti J, "Consideraciones del caso argentino ante la jurisdicción del CIADI" Centro Argentino de Estudios Internacionales, at www.caei.com.ar, Alfaro C & Lorenti P, "The Growing Opposition of Argentina to ICSID Arbitral Tribunals, A Conflict between International and Domestic Law?" 2005, 6(3) *The Journal of World Investment and Trade*; Granato L, "Protección del inversor extranjero y arbitraje internacional en los Tratados Bilaterales de Inversión" Working Paper no. 3, Centro Argentino de Estudios Internacionales: Derecho Internacional, 98 at http://www.caei.com ar/es/programas/di/inverson.pdf (10 July 2008); Miguel M H, "Caso Cartellone: ¿es también una cálida manta para Calvo?" (2005) 3 *IABA Law Review/Revista Juridica de la FIA*; Naón, Horacio A. Grigera, "Arbitration and Latin America: Progress and Setbacks" (2005) 21(2) *Arbitration International*; Berges, M A "Constitutionalidad o Inconstitutionalidad de la Jurisdicción del CIADI y sus eventuales laudos" ElDial.com Biblioteca Juridica Online; Gonzales Campana G, "Desnaturalizacion del arbitraje administrativo" (2004) August, *La Ley* Sup.Adm 8

[45] The ICSID Convention provides a number of opportunities for a state to limit its consent to ICSID jurisdiction. These provisions are not retrospective and would not affect materially affect the Argentine Cases. However the non adoption of these limitations is indicative of Argentina's stance towards ICSID arbitration. The relevant articles are:

> article 25 ...
> (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States Such notification shall not constitute the consent required by paragraph (1).
>
> article 26
> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.
>
> article 71
> Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

4.3 Avoiding Compliance Using the ICSID Framework

4.3.1 Re-interpreting compliance, recognition and enforcement

As discussed above, article 54 of the ICSID Convention is a security provision in the event of non-compliance with an ICSID award. Contrary to the well established interpretation of the compliance and enforcement mechanisms under ICSID,[46] Argentina has recently argued that enforcement proceedings under article 54 are a necessary step in obtaining compliance with an award.[47] The interpretation of articles 53 and 54 of the ICSID Convention is fundamental, as complying with awards' obligations directly relates to the value of ICSID arbitration as a mechanism for the resolution of investment disputes.

While recognising the unequivocal and unconditional international law obligation in article 53 of the ICSID Convention to abide by and comply with the terms of the award,[48] Argentina claims that "article 53 does not suffice to describe the obligations and effects of the award for the state party to the dispute".[49] It does not agree that "Article 54 only applies after the losing state fails to pay an award pursuant to Article 53",[50] and instead asserts that an investor "has to follow the procedures provided for in the laws concerning enforcement of judgements in force in Argentina".[51] This interpretation implies that

---

[46] Schreuer C, above n4, 1087:

> the [Article 53] obligation is independent of any procedural obstacles that may arise in the course of enforcement. Article 54 refers to the law of the State in which recognition and enforcement are sought. But any difficulties that may arise under that law in no way affect the obligation of a party to comply with an award

[47] Letter from Argentina, Procuracion del Tesoro de la Nacion, to Claudia Frutos-Peterson, Secretary of the *ad hoc* Committee, 2 June 2008, *Re Siemens AG v Argentine Republic* (ICSID Case No ARB/02/08); Peterson L, "CMS Energy urges Argentina to pay ICSID award" Investment Treaty News, (11 January 2008) at http://www.iisd.org/pdf/2008/itn_jan11_2008.pdf

[48] Letter from Argentina, Procuracion del Tesoro de la Nacion, to Claudia Frutos-Peterson, Secretary of the ad hoc Committee, 2 June 2008, Re *Siemens AG v Argentina* (ICSID Case No ARB/02/08)

[49] Ibid.

[50] Ibid.

[51] Letter from Osvaldo Guglielmino, Procurador Del Tesoro de la Nacion, Government of Argentina, to Claudia Frutos-Peterson, Secretary of the ad hoc Committee, 7 April 2008, Re *Siemens AG v Argentina* (ICSID Case No ARB/02/08) at 4 cited in Letter from Lisa J. Gosh, Acting Assistant Legal Advisor, Office of International Claims and

Argentina will not directly comply with ICSID award obligations but will wait until the award creditor institutes enforcement proceedings against it. Essentially arguing that enforcement proceedings under article 54 of the ICSID Convention must be instituted before it will comply with the terms of the award.

To justify this interpretation, Argentina claims that article 54 protects ICSID awards from "ordinary" (non-ICSID award) enforcement proceedings under Article V of the *New York Convention*[52] and local law public policy exceptions, and for this reason enforcement proceedings must be instituted before compliance is required:

> Absent this provision [article 54], a public official or a State that has been condemned to pay an award or a court of such State would regard an ICSID award as an "ordinary" foreign arbitral award.[53]

This argument fails to acknowledge the final and binding nature of ICSID awards established by other provisions of the ICSID Convention, namely articles 53[54] and 26,[55] and therefore does not substantiate why article 54 is a necessary step to compliance with an ICSID award. Argentina's interpretation challenges the accepted interpretation of the ICSID Convention that the obligation to comply with an award exists under article 53 and that there is no need for an award to be brought before any court of any state unless the award debtor fails to comply with its obligations. Only then, and only in relation to "pecuniary obligations", will an award creditor bring enforcement proceedings under article 54.

Investment Disputes, to Claudia Frutos-Peterson, Secretary General of the ad hoc Committee, Re *Siemens AG v Argentina* (ICSID Case No ARB/02/08) Annulment Proceeding, 2

[52] For a discussion on grounds for avoiding enforcement under the *New York Convention* see above 3.2

[53] Letter from Argentina, Procuracion del Tesoro de la Nacion, to Claudia Frutos-Peterson, Secretary of the ad hoc Committee, 2 June 2008, Re *Siemens AG v Argentina* (ICSID Case No ARB/02/08)

[54] ICSID Convention, article 53 in relevant part:

> ...the award...shall not be subject to any appeal or to any other remedy except those provided for in this Convention

[55] ICSID Convention, article 26 in relevant part:

> ...consent...shall be deemed consent...to the exclusion of any other remedy.

4.3.2 Support for Argentina's interpretation

Argentina's interpretation could be attributed to the lack of clarity from tribunals and *ad hoc* committees when addressing enforcement issues.[56] For example, the *ad hoc* committee in the *CMS Annulment Decision* stated that "the effect of a stay is that the award is not subject to enforcement proceedings under article 54 of the ICSID Convention pending the outcome of the annulment application".[57] This statement is correct; a stay will prevent enforcement proceedings under article 54. Yet it implies that the obligation to comply with an award lies with article 54 when it is in fact found at article 53. The *ad hoc* committee later clarified this, stating that the provision of a bank guarantee would convert the undertaking of compliance under article 53 of the ICSID Convention into a financial guarantee".[58]

The express preservation of a state's immunity from execution under article 55 of the ICSID Convention could also be interpreted as requiring enforcement proceedings as an essential step in obtaining compliance of an award. However, article 55 does not place a requirement on the parties to consider questions of sovereign immunity; instead it is an option reserved for states in the event they seek to claim it.

4.3.3 Pleading sovereign immunity in the Argentine Cases

In order to levy execution against the assets of Argentina under article 54, an award creditor will need to consider where Argentina holds its assets, identify which assets serve as objects of the execution, and the rules and procedures governing execution of those assets. This will allow it to assess the forum offering the least resistance to enforcement of its award.[59] Identification of assets is complicated by privacy and

---

[56] As compliance with an award occurs after a tribunal has made its award, enforcement is not an issue widely dealt with by tribunals.

[57] *CMS Decision on Respondent's Request for a Stay of Enforcement* par 35

[58] *CMS Decision on Respondent's Request for a Stay of Enforcement* par 39

[59] Delaume G, "State Contracts and Transnational Arbitration" (1981) 74(4) *The American Journal of International Law* 784, 817

confidentiality of banking laws,[60] and the variance in sovereign immunity laws from state to state makes forum shopping a distinct reality in enforcement proceedings in the Argentine Cases. It may be that Argentina has no significant executable assets outside its own jurisdiction, or none in the Contracting State where execution is sought. It would be guesswork to suggest which Contracting State's sovereign immunity rules are relevant to the Argentine Cases.[61]

Sovereign immunity is a significant hurdle to the enforcement of arbitral awards, and trends indicate that courts will permit the plea of sovereign immunity to avoid potential conflicts with other states.[62] It is often not legal considerations, such as the distinction between commercial and government acts, but a court's unwillingness to participate in sensitive foreign policy issues which is the decisive factor.[63] There may be policy reasons such as the fear of provoking a flight of capital from the jurisdiction, or a court may be disinclined to support the interest of foreign parties in whom they have no interest by enforcing an award against a state with whom they may well have close relations.[64]

Significant challenges to enforcement by use of the sovereign immunity defence in the Argentine Cases may encourage future investors to devise ways of avoiding this situation in the future. A potential measure would be for investors to require the question of sovereign immunity be dealt with expressly in the contract with a state.[65] While the

---

[60] Boralessa A, above n15, 79

[61] A state must be a signatory of the ICSID Convention and therefore a "Contracting State". For a thorough analysis of the sovereign immunity rules in the United Kingdom and the United States see Boralessa A, above n15. A good summary of the United States position is also provided by Delaume G, above n59, 485

[62] Sornarajah M, above n36, 296

[63] Ibid.

[64] Ibid, 297

[65] Delaume provides an example:

> The consent to [ICSID arbitration] shall not preclude any party to this agreement from taking any provisional measures or pursuing any provisional remedies, such as attachment or similar proceedings, which may be available to such party under the laws of any jurisdiction, pending the institution of any arbitration proceedings pursuant to this Agreement or pending the rendering, execution and payment in full of any arbitral award made by the Arbitral Tribunal.
> The [Government] hereby agrees that, should [the investor] bring any judicial proceeding in relation to any matter arising under this Agreement, including without limitation any arbitration proceeding and any action to enforce any arbitral award, no immunity from such judicial proceeding, from attachment of the [Government's]

desire to attract direct investment and the need to display an attractive investment climate to increase investor confidence may prompt a state to accept this position,[66] it is a restrictive provision and states may be reluctant to include it, or may limit its effectiveness to certain types of property.

At a bilateral or multilateral treaty level, it is unlikely that a waiver of immunity would be accepted, especially given the implications this would have under the presence of a Most-Favoured-Nation ("MFN") clause. Furthermore, while a waiver of immunity clause may increase the chances of execution, the validity and enforceability of such a clause will ultimately depend on the law in force in the forum where execution is sought.[67]

4.3.4 Enforcement proceedings in the Argentine Cases

Argentina has responded to requests for payment of the *CMS Award* with a request that CMS pursue enforcement of the award under article 54 of the ICSID Convention.[68] Implicit in Argentina's insistence on the institution of enforcement proceedings is that they will not be followed by straightforward compliance, as otherwise such proceedings would be unnecessary.

> property or from execution of judgement shall be claimed by or on behalf of the [Government] or with respect to its properties, any such immunity being hereby waived by the [Government]

Delaume G, above n59, 795

[66] Boralessa A, above n15, 104

[67] In the United States a waiver would have limited effect because under its sovereign immunity laws a state does not have the power to waive immunity of non-commercial assets. In the United Kingdom commercial assets do not enjoy immunity so a waiver is devoid of legal meaning, regarding non-commercial assets, with some limited exceptions, immunity can be waived. Boralessa A, above n15, 114

[68] Peterson L, "CMS Energy urges Argentina to pay ICSID award" *Investment Treaty News*, 11 January 2008 at http://www.iisd.org/pdf/2008/itn_jan11_2008.pdf (2 October 2008).

Osvaldo Guglielmino (Procurador Del Tesoro de la Nacion) makes reference to this when discussing the exercise of the option to purchase shares awarded under the CMS Award:

> Argentina will make use of this option when the company complies with all the requirements to execute the award in accordance with the rules of ICSID (author's own translation)

Original text reads: "La Argentine va a hacer uso de la opcion cuando la empresa cumpla con todos los requisitos para ejecutar el laudo conforme a las reglas del CIADI"; "Se vende un juicio contra la Argentina por u$s180 millones" at http://totalnews.com.ar/index2.php?option=com_content&task=view&id=14196&po 4/07/2008; This position was also adopted by Argentina in *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/08)

Insisting on enforcement proceedings before compliance could be part of a strategy to delay payment as long as possible while the remaining Argentine Cases are pending, or to provide the basis on which to claim sovereign immunity. Alternatively, if enforcement proceedings are instituted in Argentina, they could be used as the basis from which Argentina seeks review of ICSID awards in their national courts.[69] Whatever the reason, the requirement for enforcement proceedings before compliance with an award challenges the well established interpretation of articles 53 and 54 and provides a precedent for award debtors to draw out the process of complying with a final ICSID Award.

4.4 Avoiding Compliance From Outside the ICSID Framework

Strategies to avoid compliance with ICSID awards based on arguments from outside the provisions of the ICSID Convention have also been developed. One of the key arguments posed challenges the constitutionality of the ICSID Convention under the Argentine Constitution. This argument has two alternative grounds: an alleged failure to comply with Argentina's legal requirements when ratifying and entering into the ICSID Convention; and alleged breaches of public policy principles protected under the Argentine Constitution. Arguments to allow ICSID Awards to be subject to a review by Argentine Courts have also been explored.

4.4.1 The unconstitutionality of an international treaty

a) General principles under international law

There are two longstanding views regarding the domestic unconstitutionality of an international treaty: first, the "constitutionalist" view that the violation of an internal law invalidates the consent of the state to be bound by the treaty (it is *ultra vires*);[70] and second, the "internationalist" view that when consent with apparent authority of the state

[69] See below 4.4.3

[70] Sornarajah M, above n36, 109

is given, the state is bound by that consent even if a prescription of internal law has not been complied with.[71]

The position at international law is well established. The international law obligation to abide by and comply with treaty obligations is reinforced by the principle *pacta sunt servanda.* This is supported by the principle of customary international law that a state may not rely on its national law to justify a failure to carry out an international obligation, which is restated at article 27 of the Vienna Convention:

> Article 27: *Internal law and observance of treaties*
> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46

This principle has been consistently applied by international tribunals[72] and has been interpreted a applying to all internal laws including a state's constitution:

> Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfilment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions. [73]

An exception to this rule is permitted under article 46 of the Vienna Convention:

> Article 46: Provisions of internal law regarding competence to conclude treaties
> 1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
> 2. A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practise and in good faith

Therefore, while not providing an absolute bar to reliance on internal law as grounds for the invalidity of a treaty, the circumstances in which a state can rely on its own laws to

---

[71] Ibid.

[72] Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, PCIJ, Ser B, No 10; The Inter-American Court of Human Rights, Advisory Opinion on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, OC-14/94, Ser A, No 14, par 35, 116 ILR 320

[73] The Inter-American Court of Human Rights, Advisory Opinion on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, OC-14/94, Ser A, No 14, par 35, 116 ILR 320 cited in Denza E "The Relationship between International and National Law" Chapter 14, Evans M D (ed), above n17, 425

avoid compliance with an international obligation under the doctrine of *ultra vires* are limited.

A policy justification for not permitting a state entity to rely on the *ultra vires* doctrine to resile from an agreement to arbitrate was provided by Judge Keba Mbaye of the ICJ, at a seminar on international arbitration:

> For a long time the French speaking countries of Africa, following French example, had thought that they could avoid arbitration by citing procedural rules forbidding them to agree to internal [international] arbitration...this situation was sapping the confidence of economic partners of these countries. It was a question of pure good faith. A state must not be allowed to cite the provisions of its law in order to escape from an arbitration that it has already accepted. [74]

Rather than minimising the importance of national laws, this principle maximises the responsibility of states to uphold their commercial commitments, providing certainty to international commercial agreements with states.[75]

b) General principles under Argentine law

The power to enter into treaties is an executive power within the *Constitución de la Nación Argentina* (*Constitution of the Argentine Nation*) 1853 (hereinafter the "Argentine Constitution").[76] Parliament examines all proposed treaty actions and passes legislation ratifying those treaties. A treaty acquires the status of domestic law once parliament has adopted a law authorizing its ratification and no further law specifically incorporating international law into the domestic system is required.[77] A further balance in the

---

[74] Sornarajah M, above n36, 108

[75] Romero S, "ICC Arbitration and State Contracts" (2002) 13 *ICC International Court of Arbitration Bulletin* 34, 35

[76] *Constitución de la Nación Argentina* (The Constitution of the Argentine Nation) 1853, revised 1994 at http://www.senado.gov.ar/web/consnac/consnac.htm (6 November 2008)

[77] Buergenthal T, "International Tribunals and National Courts: The Internationalization of Domestic Adjudication" in Rudolf Bernhardt, Ulrich Beyerlin & Michael Bothe Springer *Recht zwischen Umbruch und Bewahrung Völkerrecht, Europarecht, Staatsrecht. Festschrift für Rudolf Bernhardt* 1995, 688, 699. This system of incorporation reflects the monist theory of the relationship between international law and national law Argentina is not a pure monist system, as this would place international rules at the apex of its legal hierarchy with its constitution and other laws below it. Instead Argentina places international treaties below the constitution in its legal hierarchy. The classification of a state as "monist" or "dualist" does not assist in predicting how its courts will approach the complex questions which arise in litigation involving international law; Denza E "The Relationship between International and National Law" Chapter 14, Evans M D (ed), above n17, 429

Argentine Constitution is the judiciary's oversight of the system; constitutional control is not entrusted to the Congress or the Executive, but rests with the judiciary and in last resort with the National Supreme Court, which can declare a law unconstitutional.[78]

The Argentine Constitution was amended in 1994 (hereinafter the Constitutional Reform). The Constitutional Reform introduced a number of modifications regarding the hierarchy of international treaties in Argentina's legal system. As a general rule, it established that international treaties are subordinated to the Constitution but prevail over other laws and normative measures.[79] Thus the Argentine Constitution sets up its legal hierarchy as being: (1) the constitution (2) international treaties and (3) domestic laws.[80] International treaties are therefore subordinated to the constitution but prevail over other laws.[81]

The Constitutional Reform established categories of international treaties as follows:[82]

1) Human Rights Treaties;
2) Integration Treaties;
3) Treaties not included under the previous items concluded with other nationals or international organizations;

---

[78] 1) a lawsuit must be filed with the court, in which unconstitutionality is claimed by a party to that lawsuit; (ii) the courts cannot declare unconstitutional acts issued by other governmental branches-"non-justifiable questions", (iii) filing of the request is in the due procedural form; (iv) that both the claimant and the defendant have standing as to the constitutional question, and (v) that the rights are not affected by the statute of limitations. See, Torricelli M, "El sistema de control constitutional Argentino", Lexis Nexis, Argentina, 2002 ch II-B cited in Alfaro C & Lorenti P, "The Growing Opposition of Argentina to ICSID Arbitral Tribunals, A Conflict between International and Domestic Law" (2005) 6(3) *The Journal of World Investment and Trade*, 421

[79] Argentine Constitution, section 75.22

[80] Argentine Constitution, section 75.22

[81] The hierarchy of the international treaties was established before the Constitutional Reform in the Supreme Court decisions of *Ekmedjian, Miguel A c/Sofovich, Gerado y Otros* (Fallos 315:1492, del 07/07/92). Prior to this, decisions treaties and federal statutes had been accorded the same normative ranking in Argentina with the later in time prevailing in the case of conflict. The interpretation was followed in *Fibraca Constructora S C A c/Comisión Mixta de Salto Grande* (Fallos 316:1669 del 07/07/93) and *Hagelin, Ragnar c/Estado Nacional* (Fallos 316·2176, del 22712/93). An international treaty's hierarchy over domestic laws is also established under article 27 of the *Vienna Convention* to which Argentina is a party see above 4.4.1a) & Chapter 2 n12

[82] Rosatti H D, "Globalization, Statism and Law (Argentina and ICSID)" (translation) (2004) 2(3) *Transnational Dispute Management*, 12

This thesis will not discuss items 4 & 5 as they are not relevant

4) Concordats with the Holy See; and
5) Conventions concluded by the provinces with notice to national congress.

This categorisation affects both the general hierarchical position of treaties relative to the Argentine Constitution and a treaty's incorporation into the Argentine legal system. Human Rights Treaties are given constitutional hierarchy; they are not subordinate to the principles of the Constitution but are equal to it. Human Rights treaties have direct entry to Argentina's legal system.[83] The remaining categories of treaty follow the general principle above and are accorded a position superior to national legislation but below the Constitution.[84] "Integration" treaties require legislation to be approved by am absolute majority before being incorporated into the Argentine legal system,[85] while non-

---

[83] Argentine Constitution, section 75.22:

> ...
> The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; **in the full force of their provisions, they have constitutional hierarchy**, do no repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House.
> In order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress. (author's emphasis)

[84] Argentine Constitution, section 75.22:

> Congress is empowered:
> ...
> To approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. **Treaties and concordats have a higher hierarchy than laws.** (author's emphasis)
> ...

Argentine Constitution, section 75 25:

> Congress is empowered:
> ...
> To approve treaties of integration which delegate powers and jurisdiction to supranational organizations under reciprocal and equal conditions, and which respect the democratic order and human rights. **The rules derived therefrom have a higher hierarchy than laws.** (author's emphasis)

[85] Integration treaties with Latin American countries require the absolute majority of all members of each house. In the case of integration treaties with non-Latin American Countries the National Congress, with the absolute majority of the members present of each house, shall declare the advisability of the approval of the treaty which shall only be approved with the both of the absolute majority of all the members of each House, one hundred and twenty days after the said declaration of advisability; Argentine Constitution, section 75.24 (2)

integration treaties are incorporated by legislation approved by a normal majority.[86] There is no explanation in the Argentine Constitution for what constitutes an integration treaty.

Broadly speaking, international agreements have either "co-operation" or "integration" purposes. Co-operation treaties aim to coordinate the actions of states to achieve some common goals. Under a co-operation treaty no sovereign powers are transferred to the created organisation. In contrast, integration treaties are treaties where a supranational organisation receives a delegation of powers related to the superior functions of the member states. Executive, legislative and jurisdictional powers on certain matters are transferred and the organisation can adopt decisions directly applicable within their territories. Integration treaties often involve the linking of economic and political domains of states, the main example being the European Union.[87]

4.4.2 The unconstitutionality of the ICSID Convention

a) Missing procedural steps

The Constitutional Reform was enacted on 24 August 1994 almost parallel to the incorporation of the ICSID Convention in Argentina's domestic legal system.[88] Some steps incorporating the ICSID Convention into the domestic legal system were completed before the Constitutional Reform and others after it. It has been argued that certain requirements instituted by the Constitutional Reform have been left out of the ICSID Convention treaty making process, specifically the special approval requirements for integration treaties. As a consequence it is argued that the ICSID Convention and any award stemming from it are null and void.[89]

---

[86] Argentine Constitution, section 75.22 (1)(3)

[87] Mattli W, "Explaining regional integration outcomes" (1999) 6(1) *Journal of European Public Policy* 1. See also, Alfaro C E & Lorenti P, above n78, 429

[88] The ICSID Convention was signed by Argentina's Executive Branch on 21 May 1991, approved by Congress by Law 24.353 on 28 July 1994 and promulgated by the Executive on 22 August 1994.

[89] Perotti J, "Consideraciones del caso argentino ante la jurisdicción del CIADI" Centro Argentino de Estudios Internacionales (Argentine Center of Internacional Studies- Working Papers Series), 9 at

It is important, then, to assess the ratification of the international treaties relevant to the Argentine Cases, including the series of BITs entered into with Argentina and the ICSID Convention. According to their preambles, BITs consist in the "promotion of greater economic cooperation among states" in order to achieve "economic development of the parties", to "stimulate private economic incentive" as well as to "maintain a stable framework for investment".[90] BITs are clearly co-operation treaties and therefore form part of the category of treaties referred to in the Argentine Constitution section 75.22(1), meaning that they are incorporated by legislation approved by a normal majority and enjoy a rank higher than laws and statutes, but below the Constitution.

The ICSID Convention approves the mechanisms for the settlement of disputes based on conciliation and arbitration. It does not require a delegation of competencies related to the state's activities or effect a progressive relinquishment of its sovereignty. Nor does it establish an organizational structure to manage state activity. The ICSID Convention simply binds states to recognise common procedural rules to be applied in order to settle a dispute.[91] The impermanence of ICSID arbitration panels, which are constituted on an *ad hoc* basis for specific cases,[92] further differentiates it from integration organizations such as the United Nations or the European Union, which are permanent international agencies structured on the basis of a division of powers.[93]

ICSID's lack of "integration" purposes means that the ICSID Convention corresponds, within the Argentine Constitution, to the procedure established in section 75.22(1) and does not require a special majority approval to form part of Argentina's legal system. The

---

http://www.caei.com.ar/es/programas/0011/08.pdf (21 July 2008). For support for this line of argument see, *Tinoco Arbitration* (1923) 1 UNRIAA 371. In that case the Tinoco government entered into an agreement with a foreign corporation without obtaining senate approval as required under its constitution. When the government fell, the new government passed a degree nullifying the agreement. The arbitrator held that the claim based on the agreement should be dismissed as the agreement was *ultra vires* to the constitution existing at the time of the agreement; Sornarajah M, above n36, 99

[90] Rosatti H D, above n82,17

[91] Ibid, 20

[92] Alfaro C & Lorenti P, above n78, 429

[93] Rosatti H D, above n82, 19

ICSID Convention ranks higher than other laws and lower than the Argentine Constitution.

As discussed above, the ICSID Convention is not an "integration" treaty. If the Constitutional Reform provisions applied to the treaty making process, the procedure relating to integration treaties does not. Therefore the ICSID Convention was correctly signed, approved and ratified for its incorporation into the Argentine legal system and cannot be invalidated as unconstitutional on this ground.

b) Violating public law principles protected by the Argentine Constitution

The second argument for the unconstitutionality of the ICSID Convention relies on section 27 of the Argentine Constitution, which provides:

> The federal government is requested to consolidate peace and commerce relations with foreign powers by means of treaties that shall be subject to the public law principles set forth in this Constitution. [94]

The validity of the ICSID Convention in Argentina can be tested by ascertaining compatibility with the "public law principles" referred to in section 27. This argument has been developed on a number of grounds.

(i) Breaching the basic foundations of Argentina's legal framework

The public law principles protected by section 27 establish the basic foundations of the Argentine legal framework, the observance of which is a condition established for the validity of international commercial treaties.[95] According to Argentina's former Attorney-General, Horacio Rosatti, these public policy principles include: (1) the republican representative form of government; (2) the principle of legality and reserve; (3) equality before the law; (4) the principles of due process; and (5) the non-absolute character of rights and the standard of reasonableness.[96] Rosatti claims that the ICSID

---

[94] Translation taken from Alfaro C & Lorenti P, above n78, 418

[95] Rosatti H D, above n82, 27

[96] Ibid.

Convention/BIT combination is unconstitutional for breach of these principles contrary to section 27 of the Argentine Constitution.

The representative and republican form of government[97] is allegedly violated because it inhibits and curtails the legislative and judicial branches of government.[98] The legislative branch is restricted from modifying its initial legal conditions through stabilization clauses; Rosatti uses the example of a BIT with Panama to illustrate this point.[99] This relevant clause refers to the expropriation of investments without compensation by the modification of laws; it does not restrict Argentina's legislative activity *per se*, but requires compensation to be paid in the event that such laws result in expropriation. The clause is also heavily qualified by exceptions for public utility or social unrest. For these reasons it is unlikely that this argument will have any substantive effect on the Argentine Cases. Furthermore, there is no equivalent provision in the US-Argentina BIT, which is the relevant BIT in all but one of the decided Argentine Cases. Therefore the argument would have no bearing on the BITs establishing the basis for these cases or for arguing the invalidity of the ICSID Convention.

The alleged inhibition or curtailing of the judicial branch relates to restrictions on the exercise control of constitutionality;[100] the principle of *due process of law* is also claimed to be violated in this way.[101] Rosatti argues that Argentina cannot anticipatorily or definitively waive its right to undertake constitutional control of certain acts in domestic

---

[97] Argentine Constitution, section 1

[98] Rosatti H D, above n82, 27

[99] *Bilateral Investment Treaty between Argentina and Panama* (Approved by Law 24, 971):

> none of the parties shall take, directly or indirectly, measures of expropriation or nationalization, or any other similar measure, including the modification or derogation of laws having the same effect"- This example relate to expropriation- taken in the context of the Argentine Cases, this provisions in the US-Arg BIT provides .....- and it was not established- in this sense the argument that this provision inhibits the legislative arm of government is not established

Rosatti also argues that the principle of *absolute nature of rights and the standard of reasonableness* is violated in this way: Rosatti H D, above n82, 28

[100] Ibid, 27

[101] Ibid, 28

courts.[102] The anticipatory control of the constitution is breached because the BIT/ICSID Convention combination does not require the exhaustion of local remedies prior to its submission to arbitration.

The Argentine Executive branch was given the power to submit disputes with foreigners to judges of other jurisdictions and arbitral tribunals in 1973.[103] This provision, in conjunction with the power to conclude treaties under the Argentine Constitution, provides the basis for Argentina's submission to disputes to a foreign jurisdiction in numerous international agreements.[104] The power of Argentine courts to decide questions arising under the Constitution is not disputed; section 116 of the Argentine Constitution grants courts the power:

> to hear and decide all cases arising under the Constitution and the laws of the nation...and ...under treaties made with foreign nations: all matters in which the nation shall be a party ...[105]

However, this provision does not prevent the submission of disputes to an alternate jurisdiction, which is established above and supported by section 117 of the Argentine Constitution:

> In the aforementioned cases the Supreme Court shall have appellate jurisdiction, with such regulations and exceptions as Congress may prescribe; but in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a province shall be a party, the Court shall have original and exclusive jurisdiction.[106]

---

[102] Ibid, 10; Bouzas R & Chudnovsky D, "Foreign Direct Investment and Sustainable Development. The Recent Argentina Experience" Universidad de San Andrés Victoria (Argentina) 2005, 5(a)

[103] Law 20.548 at article 7 (ADLA XXXIII-D-3657), modifying law 11.672. Granato L, "Protección del inversor extranjero y arbitraje internacional en los Tratados Bilaterales de Inversión" Working Paper no. 3, Centro Argentino de Estudios Internacionales: Derecho Internacional, 98 at http://www.caei.com.ar/es/programas/di/inverson pdf (10 July 2008)

[104] Granato L, above n103, note 254 and accompanying text

[105] Argentine Constitution, section 116:

> The Supreme Court and the lower courts of the Nation are empowered to hear and decide all cases arising under the Constitution and the laws of the Nation, with the exception made in Section 75, subsection 12, and under the treaties made with foreign nations; all cases concerning ambassadors, public ministers and foreign consuls; cases related to admiralty and maritime jurisdiction; matters in which the Nation shall be a party; actions arising between two or more provinces, between one province and the inhabitants of another province, between the inhabitants of different provinces, and between one province or the inhabitants thereof against a foreign state or citizen.

[106] Argentine Constitution, section 117

On this basis, in cases not concerning ambassadors, ministers and consuls, and when a province is not a party, the court does not have original or exclusive jurisdiction, thus defeating the requirement for anticipatory jurisdiction as a public policy principle under the Argentine Constitution.

In the context of BITs, Argentina traditionally required the exhaustion of local remedies prior to submitting a dispute to the jurisdiction of an international tribunal. The BIT signed between France and Argentina on 3 July 1991 marked the end of this trend and allowed for disputes to be taken directly to international arbitration.[107] In terms of the ICSID Convention, Rosatti's argument overlooks that the ICSID Convention allows contracting states to require the exhaustion of local remedies as a condition of its consent to arbitration.[108] Argentina's consent without requiring this condition provides a strong presumption that its intention was to have recourse to arbitration under ICSID to the exclusion of any other remedy.[109] The impediment to exercising prior judicial control over a dispute thus lies not with the ICSID Convention but with the exercise of an autonomous right by Argentina when it ratified the ICSID Convention.

The definitive waiver of constitutional control, claimed to breach public law principles, occurs by the non-reviewability of Awards under articles 26, 53 and 54 of the ICSID Convention. Section 116 of the Argentine Constitution gives Argentine courts the power to hear all matters to which the nation is a party,[110] while section 117 vests in the Supreme Court appellate jurisdiction in such cases. Importantly, section 117 allows for any exception to this jurisdiction the Congress may prescribe. The Congress's acceptance

---

[107] *Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments*, signed on July 3, 1991 and in force since March 3, 1993 (France-Argentina BIT)

[108] ICSID Convention, article 26:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other local remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

[109] ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) 4 ILM 524, par 32 at http://www.icsid.worldbank.org-ICSID-StaticFiles-basicdoc-CRR_English-final.pdf

[110] Argentine Constitution, section 116 see above n105

of the ICSID Convention, which allows for the award of non-reviewable decisions, forms such an exception. Thus defeating claims that the ICSID Convention violates public law principles on this ground.

A third argument in breach of the public policy principle of *the representative and republican form of government* is that the election of arbitrators by the executive branch of the government causes an imbalance of powers in government, which results in an erosion of the principle of "separation of powers", essential to the republican form of government.[111] This alleged violation lies not in the ICSID Convention, which requires only that the Contracting States appoint arbitrators without specifying how they should be appointed by the respective states, but with the Argentine government, and so cannot be relied upon to establish the ICSID Conventions unconstitutionality.

Finally, Rosatti argues that the principle of *legality and reserve*[112] is violated by the over-estimation of the legal value of commercial treaties, which introduce a modification of the Argentine normative hierarchy.[113] This argument is circular, as it succeeds only if the other arguments supporting unconstitutionality are unsuccessful.

(ii) Violating "matters" of public policy

A broad interpretation of "public law principles" would include "matters of public policy". Matters of public policy are defined by Argentine law as a feature of some laws which regulate matters related to the basic order of society or the fundamental institutions of the state.[114] They are the laws which regulate principles of public policy. Argentine law registers the following categories of laws embodying matters of public policy:

---

[111] Rosatti H D, above n82, 29

[112] Argentine Constitution, section 19:

> The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit.

[113] Rosatti H D, above n82, 29

[114] Alfaro C E & Lorenti P, above n78, 423

Constitutional rules and principles;[115] *general legal principles*;[116] *good morals and justice standards*;[117] *emergency laws*;[118] and *reform laws*.[119] The classification of laws embodying "matters of public policy" is made by Congress itself, and courts have historically been reluctant to review this classification.[120]

Extending the concept of public law principles in this way would mean that section 27 of the Argentine Constitution requires international treaties to comply with public law principles recognised as such by the Constitution and by domestic laws related to matters of public policy.[121] Under the Constitution, no distinction is drawn between ordinary laws and those concerning "matters of public policy"; all of them are subordinated to international treaties.[122] Requiring treaties to comply with domestic laws relating to matters of public policy turns the constitutional legal pyramid upside down, because the Argentine Constitution plainly requires that international treaties prevail over domestic law.[123]

Contrarily, it could be argued that a law which relates to a matter of public policy is actually representative of the Constitution, and so a treaty in conflict with a "matter of

---

[115] The Argentine Constitution registers its own supremacy over international treaties: Argentine Constitution sections 27. 31 and 75.22 and 24

[116] *National Civil Code (Codigo Civil),* Law 340 Buenos Aires, 25 September 1869 at http://www.saij.jus.gov.ar/download/grt_nacion/grt_codigo_civil.html article 14, section 2 provides that foreign laws (which includes awards) will not be applicable if they are in conflict with public law principles. See, Alfaro C & Lorenti P, above n78, 423

[117] These standards which are widely incorporated in national law often make reference to ideals of justice and fairness; Ibid.

[118] Argentina's ultimate resource in periods of crisis is the enactment of emergency laws. These laws are often declared to be "public policy laws" which means their provisions are mandatory and prevail over the remaining legislation and the will of the people. The privatization process of state-owned companies during the 1990's was performed under laws of this type, mainly Laws 23.696 and 23.697 of 1989. So were the currency devaluation and "pesification" of obligations under Law 25.561 of 2002 and Presidential Decree 214/2002"; Alfaro C & Lorenti P, above n78, 424

[119] The laws which implement policy decisions deemed of high relevance. The government provides them with features of "public policy" to ensure their mandatory nature: A good example is Law 23.928 of 1992, which regulated the "convertibility" of the Argentine currency: Alfaro C & Lorenti P, above n78, 423

[120] Ibid, 424

[121] Ibid, 425

[122] Argentine Constitution, section 75.22

[123] Alfaro C & Lorenti P, above n78, 427

public policy" conflicts with the Constitution itself and not with a specific law.[124] The difficultly in establishing this position is that section 27 refers to "principles" of public policy and not to "matters", and it is difficult to identify a "principle" being breached by the ICSID Convention. For example, if an international treaty provides that Contracting States are banned from adopting "emergency" policies, such a provision would be against public policy principles set forth in the Constitution, including inhibiting legislative power. But construing the ICSID Convention as in breach of national laws which are "matters of public policy" is inconsistent with the legal pyramid.[125] The Argentine Constitution sets forth the "Principles", the laws set forth the "means" or "matters", and the international treaties lie in the middle. Thus the validity of the treaties has to be tested against the "principles" under the Constitution and not the "matters" regulated by national laws.

c) The competence to conclude treaties

In addition to the hurdles establishing the invalidity of the ICSID Convention on grounds of unconstitutionality, Argentina's obligations under the ICSID Convention may also be preserved by the Vienna Convention. In essence, articles 26 and 27 of the Vienna Convention require a party to fulfill its treaty obligations and prevent a state from invoking the provisions of its internal law as a justification for its failure to perform a treaty.

An exception to this rule is provided by article 46 of the Vienna Convention regarding a state's competence to conclude treaties.[126] To invoke this exception, the violation of

---

[124] Ibid.

[125] The author is unaware of the breach of any such law

[126] Vienna Convention, article 46:

> Provisions of internal law regarding competence to conclude treaties
> 1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practise and in good faith.

public policy principles must concern a rule of "fundamental importance". A violation must also be "manifest", that is, "objectively evident to any state conducting itself in the matter in accordance with normal practise and good faith".

Article 46 has seldom been invoked by states as a claim for invalidity.[127] The application of article 46 involves a question of fact and cases have shown that international law will not accept a claim of incompetence to conclude a treaty on this ground in all but the most clear cut cases. Courts have tended to favour the order of international relations and reveal a reluctance to look behind the ostensible authority of a state,[128] instead confirming no obligation on states to be informed about the legislative or constitutional developments of other states.[129] Nor has the incompetency of particular individuals been considered sufficient to negate a state's consent to a treaty.[130]

Rosatti argues, apparently based on article 46 of the *Vienna Convention*, that:

> what we [Argentina] are saying is that there is constitutional control and it is based on article 27 [of the Constitution] which has been in force since 1953, if investors failed to read this when they signed their contracts, then they should be claiming against their advising lawyers, not against the State of Argentina.[131]

The essence of this argument overstates the exception allowed under article 46 of the Vienna Convention which does not simply allow a state to rely on the non-compliance with a national law in order to deny that it has consented to be bound by a treaty. Rosatti's interpretation would require an investor, entering into a commercial contract under the protection of a BIT, which has ICSID arbitration as its dispute resolution

---

[127] Triggs G D, *International Law, Contemporary Principles and Practices*, LexisNexis Butterworths, Australia, 2006, 532

[128] *Eastern Greenland Case* Permanent Court of International Justice Ser. A/B, No. 53 (1933)

[129] *Cameroon v Nigeria*, 10 October 2002, ICJ, 125 cited in Triggs G D, above n127, 533

[130] *Rio Martin Case* 2 RIAA 615; *Maritime Delimitation and Territorial Questions Case (Qatar v Bahrain)* 1994 ICJ Rep 112 cited in Dixon M, *Textbook on International Law*, 6th edition, Oxford University Press, New York, 2007, 63

[131] Bourdin M, "No descarto ir a la Corte por los Laudos del CIADI" interview with Rosatti conducted by Maria Boudin, www.infobaeprofesional.com (authors own translation and parenthesis). Original text reads:

> lo que decimos es que si hay control de constitucionalidad tiene que ser sobre la base de artículo 27 que esta vigente desde 1953, si los inversores no lo leyeron cuando firmaron el tratado, deberían reclamarle a sus abogados asesores no al estado Argentina.

mechanism, to consider the constitutional basis for Argentina's voluntary consent to the ICSID Convention. The fulfilment of this requirement would result in the cessation of international commerce, for it defeats any sense of certainty when contracting with a state and conflicts with international interpretation of the divergence between national and international law.

Argentina is a signatory to the Vienna Convention, which acquired the status of domestic law once parliament adopted a law authorising its ratification.[132] This means that the obligations of the Vienna Convention form an integral part of Argentine law, and gives national courts the power to prevent violations of treaty obligation on the basis of internal laws including its constitution. It also deprives Argentine courts of an excuse not to enforce the obligations of the ICSID Convention and BITs.

While there is some merit in the argument that section 27 of the Constitution may constitute a rule of fundamental importance regarding Argentina's competence to conclude treaties, in order to find protection under article 46, the section also requires a manifest violation of that rule. The arguments developed by Argentina regarding a violation of article 27 of the Constitution include unspecific references to alleged violations principles of public policy and a reconstruction of the process of Argentina's ratification of the ICSID Convention to imply additional procedural steps.[133] A circular search for a basis on which to challenge the constitutional capacity of Argentina to enter into the ICSID Convention even if ultimately able to establish a violation of section 27 of the Constitution will be insufficient to be considered a manifest violation as required under article 46. In order to be considered manifest, a violation of a rule must have been objectively evident to a state conducting itself in accordance with normal practise and in good faith.[134] This requires that such a rule be publicised to the other state and does not

---

[132] Argentina's accession to the Vienna Convention was approved by Law 19865 of 10 March 1972 (signed by Argentina on 23 May 1969), *Boletin Oficial de la Republica de Argentina,* 11 January 1973

[133] See discussion above 4.4.2a) and 4.4.2b)

[134] Vienna Convention, article 46 (2) above n126

require a state to be informed of the legislative or constitutional development's of Argentina.[135] Even if Argentina is able to establish a breach or non-compliance of its national laws, including a provision of its constitution, Argentina's obligations under the Vienna Convention would clearly prevent it from relying on that non-compliance to deny that its consent to be bound by a treaty.

4.4.3 Domestic review of ICSID awards

A final challenge to the Argentine Cases involves subjecting ICSID awards to a domestic review mechanism before the Argentine Supreme Court.[136] This strategy conflicts with the binding obligation under the ICSID Convention that awards are final and not subject to any form of review outside those permitted by the ICSID Convention.[137] Awards are executed by national courts within a public international procedural context and are isolated from any national procedural law including Argentine law.[138] This is supported by Argentine Law. The recognition and domestic enforceability of foreign court rulings is regulated in Argentina by the *National Civil and Commercial Procedural Code.* Article 517 provides that enforcement of foreign court rulings shall be governed by the provisions of the treaty governing the decision,[139] and article 519 extends this provision to foreign arbitral awards.[140]

---

[135] *Cameroon v Nigeria*, 10 October 2002, ICJ, 125 and *Temple of Preah Vihear* Case ICJ Reports 1962, 6 at 26 cited in Triggs G D, above n127, 533

[136] Berges M A, "Constitutionalidad o Inconstitutionalidad de la Jurisdicción del CIADI y sus eventuales laudos" 30/06/2006 *Suplemento de derecho internacional privado y de la integración*, 30 June 2006, 23 at www.ElDial.com (15 July 2006)

[137] See above 4.2 1

[138] Except to the extent permitted under articles 54 and 55 of the ICSID Convention, see above 4.2.2

[139] *National Civil and Commercial Procedural Code (Codigo Procesal, Civil y Commercial de la Nacion)*, Law 17.454, Buenos Aires, 18 August 1981, *Boletin Oficial*, 27 August 1981, article 517 [original text reads]:

> Las sentencias de tribunales extranjeros tendrán fuerza ejecutoria en los términos de los tratados celebrados con el país de que provengan

Where there is no applicable treaty the enforcement of awards are governed by subsections (i)- (v). Which include at article (iv) the requirement that decisions abide with principles of public policy of Argentine law.

[140] *National Civil and Commercial Procedural Code*, article 519

A recent decision of the Supreme Court of Argentina, *José Cartellone Construcciones Civiles SA v Hidroeléctrica Norpatagónica SA o Hidronor SA s/proceso de conocimiento* (hereinafter the *Cartellone Decision*) expressly allowed for the judicial review of a domestic arbitral award.[141] Arguments have been posed to use this decision as a precedent to subject ICSID awards to a novel domestic review mechanism before the Argentine Supreme Court. [142]

In the *Cartellone Decision* the court struck down a domestic arbitral award involving a private party and an Argentine state-controlled corporation. Instead of following the accepted approach of annulling or partially annulling the award based on accepted legal principles, the court reviewed the merits of the case, disregarding an express waiver of this right. It held that a waiver of the review of merits is not valid when public policy principles are affected.[143] It went on to hold in broad terms that an arbitral award may be subject to review by the court if it is contrary to public policy, unconstitutional, illegal or unreasonable:

> [I]t cannot be fairly interpreted that the waiver of appeal to an arbitration award, extends to situations whereby the terms of an award are contrary to public policy. It is not possible to foresee, when formulating a waiver of this kind, that the arbitrators shall make a decision with such a vice. It should be noted that the appraisal of facts and the fair application of law are the arbitrators' duties and that, accordingly, their decision shall be final and conclusive under such circumstances. However, the award shall be subject to legal review if unconstitutional, illegal or unreasonable.[144]

---

[141] *Corte Suprema de la República Argentia, José Cartellone Construcciones SA v Hidroelectrica Norpatagonia SA o hidronor SA s/proceso de conocimiento*, 1 June 2004. J87. XXXVII

[142] Berges M A, above n136, 23

[143] Naón, Horacio A. Grigera, "Arbitration and Latin America. Progress and Setbacks" (2005) 21(2) *Arbitration International*, 162

[144] Author's own translation, original text reads:

> Que en atención a lo expuesto, no puede lícitamente interpretarse que la renuncia a apelar una decisión arbitral se extienda a supuestos en que los términos del laudo que se dicte contrarien el orden publico, pues no es lógico prever, al formular una renuncia con ese contenido, que los árbitros adoptarán una decisión que incurra en aquel vicio. Cabe recordar al respecto que la apreciación de los hechos y la aplicación regular del derecho son funciones de los árbitros y, en consecuencia, el laudo que dicten será inapelable en esas condiciones, pero, en cambio, su decisión podrá impugnarse judicialmente cuando sea inconstitucional, ilegal o irrazonable

cited in Miguel M H, "Caso Cartellone: ¿es también una cálida manta para Calvo?" (2005) 3 *IABA Law Review/Revista Juridica de la FIA*, 3

The references to "unconstitutionality" and "contrary to public policy" use the language from the Argentine Civil Codes, where they are grounds for annulment.[145] However, the tribunal in the *Cartellone Decision* used these grounds outside their civil code framework as a basis for conducting a review on the merits. The loose reference to "unreasonable" and the strong emphasis on the powers of the judiciary to review the award indicate that the judges favoured directly subjecting arbitral awards to appeals before the Supreme Court.[146]

Subjecting an international arbitral award to judicial review would be a clear rejection of Argentina's own precedent.[147] In *Fibraca Constructora S.C.A. c/ Comisión Técnia Mixta de Salto Grande* the Supreme Court declined to review an international arbitral award based on its obligations under the Vienna Convention. It held that voluntary acceptance of an international jurisdiction prevents the court from reviewing the decision of an arbitral tribunal, as to do so would contradict the spirit of international norms that both parties agreed upon.[148] The decision in *Cabrera, Gerónimo, Rafael y otro c/ Poder Ejecutivo Nacional*[149] reaffirmed this position and emphasised the "Doctrine of Previous Conduct" ("Teoria de los Actos Propios"). That case involved a party who, having accepted the pesification of savings in accordance with decree no. 214/02 arising from the Argentine crisis, later sought to challenge the constitutionality of that decree. The court held that the application of a law to a particular case should be sustained when the party objecting to it has, by its previous conduct, excluded the possibility of being heard:

> ...this court has held repeatedly that the voluntary submission of an interested party to a judicial regime, without express reservation, determines the inappropriateness of later challenging this regime on a constitutional basis.[150]

---

[145] *National Civil and Commercial Procedural Code* articles, 737, 752, 760, *National Civil Code* articles; 14, 21, 872 cited in Naón, Horacio A. Grigera, above n143, 164

[146] Ibid.

[147] *Ekmekdjian, Miguel A c/Sofovich, Gerado y otros*, 7 July 1992; *Fibraca Constructora S.C A c/ Comisión Técnia Mixta de Salto Grande*, 7 July 1993, Fallos: 316:1669; *Cafes La Virginia S A* , 10 October 1994, Fallos 317:1282

[148] *Fibraca Constructora S.C.A. c/ Comisión Técnia Mixta de Salto Grande*, 7 July 1993, Fallos: 316:1669 cited in Miguel M H, above n144, 5

[149] *Cabrera, Gerónimo, Rafael y otro* c/ Poder Ejutivo Nacional, 13 July 2004

[150] Miguel M H, above n144, 5

This doctrine mirrors the rule at international law which prevents a state from avoiding its international obligations by reliance on an internal law.

The *Cartellone Decision* concerns a domestic dispute, and its reasoning will not necessarily be applied to ICSID awards, although that possibility has been considered.[151] It can be distinguished from the Argentine Cases on various grounds, including that the case involved an arbitration system which did allow for public policy grounds as grounds for annulment.[152] However, the decision has already affected international arbitration with Argentina; a Federal Argentine judge recently suspended ICC arbitral proceedings based on the court's power to control and review arbitral awards for public policy or unconstitutionality reasons.[153]

As the Argentine legal hierarchy places international treaties above domestic laws,[154] an Argentine court cannot invoke domestic laws, including the *Cartellone Decision*, as grounds to review an ICSID Award, as the ICSID Convention does not allow for it.[155] This is supported by the *National Civil and Commercial Procedural Code* which allows for the enforcement of foreign awards to be governed by their respective treaties.[156] The

---

[151] Berges M A, see above n136; Bourdin M, "No descarto ir a la Corte por los Laudos del CIADI" interview with Rosatti conducted by Maria Boudin, at www.infobaeprofesional.com

[152] The impact of the *Cartellone Decision* is more certain on non ICSID international arbitration awards, including those being enforced under the New York Convention, which contain a public policy exception to enforcement, see above 3.2, in particular footnote 15 and accompanying text, see also Barbarosch G & Richards P, "Country Overviews – Argentina" *The Arbitration Review of the Americas* 2008 at http://www.globalarbitrationreview.com/handbooks/4/sections/8/chapters/48/argentina (20 July 2009).

Enforcement under the ICSID Convention is independent of the New York Convention and is easier to obtain, therefore the question of the applicability of the New York Convention to ICSID Awards is unlikely to arise, Schreuer C, above n4, 1101 par 4

[153] A federal judge granted interim measures suspending ICC arbitral proceedings based on the broad powers recognized by the *Cartellone Decision* to the Argentine judiciary to control and review arbitral awards for public policy or unconstitutionality reasons: *Entidad Binacional Yaciretá c/ Erıday y otros s/* proceso de conocimiento Juzgado de 1a. instancia en lo Contencioso Administrativo Federal No. 3, Secretaria No 5, causa 26.2444/04 decision of 27 September 2004 cited in Naón H A Grigera, above n143, 164. See also the interim measures ordered by the Argentine Court of Appeals in Administrative Matters which suspended UNICTRAL arbitration *National Grid Transco plc (UK) v Argentina* in *EN-Procuracion de Tesoro v Camara de Comercio Internacional (Argentina v ICC)* Lexis No 35010977, Barbarosch G & Richards P above n152

[154] Argentine Constitution, section 72.22

[155] ICSID Convention, articles 26, 53 & 54

[156] See above n139 & 140

application of the reasoning in the *Cartellone Decision* to an ICSID award would require the Supreme Court of Argentina to ignore these express obligations and would breach its requirement to comply with treaty obligations under the Vienna Convention.[157]

It has been suggested that governmental policies lie behind the *Cartellone Decision* and that the decision is directly related to establishing precedent for the government's stance on recognition and enforcement of ICSID awards against Argentina.[158] Whether or not this is correct, the political sensitivity of the issues in the Argentine Cases is clear and the government will carefully explore any opportunity to object to the enforcement of an ICSID award. From a legal perspective, subjecting an ICSID Award to a domestic review on the basis of the *Cartellone Decision* is a clear breach of prohibitions at both domestic and international law.

4.4.4 Success of challenges to constitutionality

Argentina voluntarily entered into a system of BITs and the ICSID Convention. To escape from international obligations when faced with negative consequences on the basis of internal laws offends international public policy. It does so by undermining the confidence necessary to ensure certainty in international transactions.[159] The position established by the Vienna Convention at articles 26 and 27 is clear: a state cannot invoke its domestic laws to avoid an international obligation. These rules form part of Argentina's national law and should be the position taken in regards to arguments of unconstitutionality of the ICSID Convention in Argentina.

> [I]nternational order public would vigorously reject the proposition that a state organ, dealing with foreigners, having openly, with knowledge and intent, concluded an

[157] Vienna Convention, articles 26 & 27

[158] This interpretation has been denied by the Legal undersecretary of the Argentina Ministry of Economy and Production: O Sisles, "Ratifican Una Añeja doctrina Sobre Laudos" *La Nacion* 7 July 2004 cited in Naón H A Grigera, above n142, 167

[159] Romero S, above n75, 39 in reference to an award rendered in 1986 in case 4381 (J.D.I 19686, 1103)

> arbitration clause that inspires the co-contractant's confidence, could thereafter whether in the arbitration or in execution proceedings, invoke the nullity of its own premise.[160]

If faced with these issues, the conclusion of the Argentine courts will be influenced by the above arguments. Ultimately their decisions will depend on the interpretation of the relationship between international and national law under the Argentine Constitution.

4.5 Resolving the Argentine Cases

Argentina is faced with the final *CMS Award.* How the arguments analysed above will be played out ultimately depends on the Argentine government's strategy in the Argentine Cases. This strategy will be impacted on by the future holdings in the Argentine Cases and whether the outcome for Argentina differs from that obtained in the current awards. Argentina has indicated that it will not directly comply with the *CMS Award,* which leaves the award creditor with the option of instituting enforcement proceedings in a Contracting State.

The push towards enforcement proceedings by Argentina may, depending where proceedings are instituted, provide an opportunity to plead sovereign immunity from execution.[161] Alternatively, if enforcement proceedings are brought in Argentina, it may provide the opportunity to conduct a review of awards.[162] Publicly challenging the validity of the ICSID system through interviews, publications and non-compliance may also be a strategic decision to buy time. Delaying payment and creating a perception that compliance is unlikely could assist Argentina in settling claims with other parties.[163]

---

[160] ICC Case No 1939 cited in Dunham P, "Balancing sovereignty and the contractor's rights in international construction arbitrations involving state entities" *5th ICC/FIDIC Conference on International Construction Contracts and the Resolution of Disputes,* October 2005, 3

[161] See above 4.2.2c)

[162] See above 4.4.3

[163] The settlement of as many cases as possible has been noted as one of Argentina's priorities: Bourdin M, "No descarto ir a la Corte por los Laudos del CIADI" interview with Rosatti conducted by Maria Boudin, 22 June 2005 at http://www.infobaeprofesional.com/notas/16705-Rosatti-No-descarto-ir-a-la-Corte-por-los-laudos-del-CIADI.html (20 October 2008)

The political and economic climate of Argentina impacts on its response to ICSID Awards. Any binding international obligations must be viewed in light of Argentina's domestic climate, a political reality which possibly requires Argentina to focus on more pressing domestic concerns than on the satisfaction of foreign creditors.[164] The desire of Argentina's current president, Cristina Fernandez de Kirchner, to enhance domestic popularity by placing its people's needs and satisfying domestic concerns ahead of those of foreign creditors may also figure as one of Argentina's primary goals. Moreover, the sheer volume of ICSID claims presented may mean the country is unable to pay.

While pressure not to damage its international reputation will be relevant to Argentina, recent developments have eased this pressure. The *CMS Annulment Decision* has been referred to as "essentially making it politically impossible for the government of Argentina to pay".[165] Furthermore, Bolivia's recent withdrawal from ICSID's jurisdiction[166] and Ecuador's limitation on ICSID's jurisdiction under article 25[167] indicate dissatisfaction with ICSID and show that Argentina's actions may not be viewed negatively by all of the international community. This view is not confined to Latin America; a Washington trade lawyer, commenting on Brazil's status in relation to investment treaties, recently remarked that "the US business community clearly still likes BITs. But why Brazil or any other country would agree to sign one after looking at

---

[164] Mortimore M & Stanley L, "Obsolescencia de la proteción a los inversores extranjeros después de la crisis Argentina" *Revista de la CEPAL,* 88, April 2006, 17

[165] Beattie A, "Concern grows over global trade regulation, International Investment Rules" *Financial Times*, 12 March 2008

[166] On 1 May 2007 Bolivia sent formal notice of its withdrawal from the ICSID Convention at http://www.bilaterals.org/article.php3?id_article=8221 (8/07/2008)

[167] On 4 December 2007 Ecuador gave notice under article 25(4) of the ICSID Convention:

> The Republic of Ecuador does not consent to the International Centre for the Resolution of Investment Disputes (ICSID) jurisdiction, for disputes arising in matters relating to natural resourses such as oil, gas, minerals and others" (author's translation)

Original text reads: La Republica del Ecuador no consentirá en someter a la jurisdicción del Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), las diferencias que surjan en materias relativas al aprovechamiento de recursos naturales como petróleo, gas, minerales u otros See, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement9 (08/07/2008)

Argentina defeats me".[168] Pressure on Argentina to comply with ICSID Awards in order to receive international funding has also been weakened. Despite its public denouncement of ICSID, Argentina has recently secured a number of significant World Bank loans.[169]

During the *CMS v Argentina* proceedings, Argentina, under the signature of its Attorney General, provided an undertaking to the claimant that:

> in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the Arbitral Tribunal in this proceeding as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event that annulment is not granted.[170]

This undertaking was regarded as "irrevocably commit[ting] Argentina to enforce the pecuniary obligations imposed upon it by the Award in the event that annulment is not granted".[171] In fact, the undertaking did no more than restate Argentina's obligations under article 54 of the Convention. For this reason, it can only provide comfort to claimants so long as Argentine courts interpret article 54 as the simple enforcement mechanism it is intended to be:

> ...final awards under the ICSID Convention are directly enforceable, upon registration and without further jurisdictional control, as final judgments of the courts of the host State. It is true that immunity from execution is reserved (Article 55), but this simply leaves the issue of immunity to be dealt with under the applicable law: (Immunity from execution of the host State in its own courts would depend entirely on its domestic law).[172]

The arguments analysed above suggest that Argentina will not afford ICSID enforcement mechanisms or ICSID awards the level of deference traditionally expected. Resorting to measures to defeat the enforcement of an award may provide a hollow victory for

---

[168] Beattie A, above n165

[169] Including the Country Assistance Strategy (CAS) Argentina announced on 6 June 2006 which includes up to US$3.3 billion IBRD financing; US$126.7 million loan to improve transport conditions of a strategic road network in the Province of Santa Fe; and two loans totalling US$180 million for the Basic Municipal Services Project and the Urban Flood Prevention and Drainage program. For a complete list of loans and their details see www worldbank.org

[170] *CMS Gas Transmission Company v The Argentine Republic* ICSID Case No. ARB/01/08 (Annulment Proceeding) Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) par 28

[171] Ibid, par 50

[172] Ibid, par 40

Argentina. The ICJ could provide a forum for the home state of an award creditor to bring an action against Argentina for its refusal to pay an ICSID award, and the World Bank could take action against Argentina for avoidance of its treaty obligations.[173]

Significant resistance is developing against pursing enforcement of awards in the Argentine Cases. This is evidenced by the negotiation of settlement of proceedings and agreements to sell awards.[174] This suggests that award creditors are opting out of further ICSID related proceedings with Argentina. While this represents a hesitation by award creditors to rely on the compliance and enforcement mechanisms under ICSID, it also indicates that the awards in the Argentine Cases have some monetary value.

4.6 Conclusion

This chapter has assessed the strength of Argentina's challenges to complying with ICSID awards. It has shown that there are significant legal obstacles in both domestic and international law to successfully establishing these arguments. The jurisprudence on challenging ICSID awards is limited, and Argentina can be expected to closely analyse any opportunity it has to avoid compliance with ICSID awards. The relationship between international law and domestic law, when addressed by international tribunals, relies on uniform and reasonably straightforward principles. The approach of the Argentine courts, as with any national court, cannot be expected to follow this trend. The starting point for their examination, and the way that international law is integrated into Argentina's legal order, is the Argentine Constitution.[175]

---

[173] As compliance with award obligations has been the norm in ICSID arbitration the effectiveness of these counteractions remain untested. See Baldwin E, Kantor M & Nolan M, above n15, 2

[174] There have been reports of a sale of the of the *CMS Award* of US$133.2 million to the Bank of America: "Se vende un juicio contra la Argentina por u$s 180 millones" *Total News*, 5 June 2008 at www.totalnews.com.ar/index2.php?option=com_content&task=view&id=1496&po (3/07/08); and the potential sale of the *Azurix* Award: Peterson L, "Enron looking to sell Azurix arbitration award" Investment Treaty News at http://www.iisd.org/pdf/2006/itn_oct13_2006.pdf

[175] Denza E "The Relationship between International and National Law" Chapter 14, in Evans M D (ed), above n17, 428

The issues discussed in this chapter should influence the way Argentina, and potentially its courts, address challenges to ICSID Awards in the Argentine Cases. However, the multitude of political, legal, economic and social factors make its difficult to predict how Argentina's government and courts will approach the complex questions arising from litigation involving international law.

The value of an ICSID award lies in compliance with its obligations. Any delay to compliance implies additional time and costs to an award creditor. Value is further decreased when a supposedly final and binding award is potentially subject to review by a domestic court and may ultimately not be respected. If award creditors in the Argentine Cases are faced with non-executable awards, ICSID's powerlessness to enforce awards and the lack of institutional remedies against non-complying states may severely weaken the financial viability of ICSID awards. The Argentine Cases threaten to provide this precedent on a large scale, which will likely weaken the appeal of ICSID arbitration to investors.

Chapter 5

Conclusions

5.1 Overview

This thesis has examined a series of investment treaty arbitrations against Argentina arising from its economic crisis of 2000-2001. Damages have been sought by investors for losses incurred from measures taken by Argentina during that crisis. These measures have been construed by investors as violating BIT provisions. The Argentine Cases have been brought before ICSID and the repeated institution of proceedings against Argentina on virtually identical grounds has held a magnifying glass to ICSID arbitration.

The Argentine Cases are at an early stage. Awards have been handed down in only seven of 42 registered cases. Rather than a limitation, studying the cases at this stage means that key lessons can be drawn out early. This allows awards in the remaining cases to respond to these lessons, which may in turn influence the impact the Argentine Cases will have on the development of ICSID arbitration.

The thesis began by presenting the framework for investment treaty arbitration under ICSID, including the proliferation of BITs internationally and the frequent nomination of ICSID as a forum for dispute resolution in those treaties. The critical examination of the Argentine Cases in the subsequent chapters has demonstrated the implications of this structure. The cases have been examined against the sequential process of ICSID arbitration, and through this analysis the thesis has focused on three key issues, identified as having the greatest impact on the development of ICISD arbitration: inconsistency in awards when considering Argentina's defence; the restriction of annulment provisions to procedural issues; and potential challenges to compliance with award obligations by Argentina.

A significant number of states have access to ICSID arbitration for the resolution of investment treaty disputes. Current worldwide economic uncertainty, including measures to prevent a run on national banks, illustrates that the Argentine experience cannot be

disregarded as a one-off experience. BIT protection and consent to ICSID arbitration through BITs is commonplace internationally. The under-utilisation of these tools may well be set to change, and states and investors alike are expected to consider the lessons drawn from the Argentine Cases in considering their approach to future ICSID arbitration.

5.2 Conclusions and Recommendations

The central aim of this thesis has been to contemplate the impact the Argentine Cases will have on the development of investment treaty arbitration under ICSID. To clearly respond to this aim the conclusions first identify the impact of the Argentine Cases on state recourse to ICSID arbitration, before discussing how the Argentine Cases may influence future ICSID awards.

5.2.1 Influencing host states foreign investment strategy

The use of BITs and the ICSID Convention as a strategy by host states to attract foreign investment with little or no regard for their legal implications has been challenged by the Argentine Cases. The repeated reliance on BIT protection by investors against Argentina has demonstrated that investors will use guarantees and protections offered by treaties and will institute arbitration proceedings under ICSID.

Arguments challenging the constitutionality of the ICSID Convention and plans to subject ICSID awards to a review by national courts suggest dissatisfaction, on the part of some Argentine government officials and legal commentators, with the previous administration's decision to ratify BITs and the ICISD Convention. For the early Argentine Cases this may simply mean Argentina fails to comply with its international obligations. In a wider context, the Argentine Cases will likely influence state policy in relation to foreign investment.

The Argentine Cases may cause host states to reconsider their current investment treaty framework and to monitor and understand the legal implications of BIT obligations and consent to ICSID. The flow of awards against Argentina may cause states to conclude

that the risk of exposure from their investment treaty framework is too costly, particularly if no appreciable investment gains can be attributed to their BIT and ICSID framework. This could result in the diminishment of investment treaty protection or a limitation on the extent of ICSID jurisdiction. At the very least, states will be expected to negotiate investment agreements as part of a clear strategy, which assesses the potential cost of commitments undertaken, and not merely as a tool to attract investment.

5.2.2 Influencing investor recourse to ICSID

The issuance of large arbitral awards in favour of investors in the majority of the early Argentine Cases has raised the profile of ICSID arbitration. This has been assisted by high profile of claimants in the Argentine Cases. BP, France Telecom, Telefonica, Enron and Suez are among the companies leading the docket of ICSID arbitration against Argentina, causing it to be referred to as the "who's who" of foreign investors.[1] The slow development of ICSID's caseload prior to the Argentine Cases can be partly attributed to the fact that many investors did not recognise the value of BITs entered into by their home states. The flurry of publications in the commercial sector regarding the Argentine Cases will likely lead to an increased appreciation of BIT protection and ICSID arbitration. It may make investors more willing to rely on these tools and to structure investments to ensure they fall within their protection.

In the same way that the issue of awards against Argentina for millions of dollars encourages the use of ICSID, the non-payment of awards by Argentina will likely attract equal attention. In the Argentine Cases this may prompt investors to settle current claims. In the long term, investors will question the benefits of submitting ICSID arbitration if they perceive awards to be ultimately unenforceable. This may in turn threaten the viability of ICSID for the future resolution of disputes.

[1] Peterson L," Argentina – Legal Tango" *Foreign Direct Investment,* London, 1 August 2005

5.2.3 Impacts on ICSID arbitration

The glaringly inconsistent interpretation of Argentina's defence in the early Argentine Cases has the potential to significantly affect ICSID Arbitration. An analysis of the *CMS* and *LG&E Awards* demonstrates the uncertainty in the scope of the defence of necessity both under treaty and customary international law, which now surrounds this vital element of the Argentine Cases. Conflicting awards, coupled with reluctance by tribunals to explain inconsistencies, weakens any informal precedent for the remaining Argentine Cases, and may in the future prevent parties to ICSID arbitrations from relying on these principles with confidence.

The Argentine Cases require the consideration of complex issues of public international law in a highly commercial context. This thesis has demonstrated that a failure to correctly consider and apply principles of public international law, including principles of treaty interpretation and *lex specialis*, can result in errors on fundamental issues. This was evidenced by the analysis of the *CMS* and *LG&E Awards* relating to Argentina's defences. The early Argentine Cases will likely prove a reference and focal point for arbitrators in future proceedings. The cases highlight the importance of the development of coherent and consistent arbitral awards that properly apply principles of public international law. The failure to respond to this concern in the remaining Argentine Cases will challenge the legitimacy of the ICSID arbitration, and cause parties to question the utility of submitting disputes to ICSID.

The implications of errors relating to substantive issues, such as Argentina's key defence, are exaggerated by the lack of substantive review for ICSID awards. While the preference for finality over correctness is widespread in commercial arbitration, in the context of ICSID arbitration the participation of a state party, the financial impact of disputes, and potentially the consideration of public international law principles gives it a wider audience and greater impact than private commercial arbitration. The analysis of the *CMS Annulment Decision* in this context established that the lack of a substantive review mechanism makes it imperative that ICSID awards form part of a consistent and coherent

legal jurisprudence, including the correct consideration of public international law principles. The failure to do this in the early Argentine Cases has undermined the adequacy of ICSID annulment provisions and contributed to the debate for a higher level of review for ICSID Awards.

The clearest threat to ICSID arbitration arising from the Argentine Cases is non-compliance with final awards by Argentina. If this threat eventuates it will constitute a direct failure of ICSID arbitration and establish an unfavourable precedent for future cases. It is acknowledged that Argentine government strategy lies at the heart of this. However, the jurisprudential issues discussed in this thesis will impact on this strategy. The inconsistent application of legal principles in early awards, the identification of errors in annulment proceedings, and a lack of power to remedy them, provide policy grounds for Argentina to justify non-compliance with its international obligations and minimise any negative repercussions potentially experienced by Argentina for a failure to comply.

5.3 Concluding Comment

The critical examination of the jurisprudence, scholarship and policy issues surrounding the early Argentine Cases has identified the key factors likely to impact on the development of investment treaty arbitration under ICSID. This thesis has relied on the previous work of scholars who have debated the issues surrounding investment treaty arbitration under ICSID, it has built on this work by analysing new jurisprudence flowing from the Argentine Cases, and identified the lessons that can be learnt from these cases. The current increase in the caseload at ICSID suggests that it is developing as a forum for the settlement of investment treaty disputes. This growth is being led by the Argentine Cases. To benefit from this unique series of cases the tribunals and annulment committee's involved in the remaining cases must respond to the issues outlined in this thesis. The final impact of the Argentine Cases on the development of ICSID will depend on whether the lessons learnt from the early cases are applied to the remaining cases. This question will require re-examination when the remaining Argentine Cases are concluded.

Appendix 1

Table of the Argentine Cases

APPENDIX 1

Table of the Argentine Cases*

	Case No.	Claimant	Industry	Bilateral Investment Treaty	Status of Proceedings	Finding of Tribunal
1.	ARB/01/3	Enron Corporation and Ponderosa Assets Pty Ltd	Natural gas transportation concession agreements	Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments, signed 14 November 1991, entry into force 20 October 1994 (US-Argentina BIT)	Award: 22 May 2007 Annulment Proceedings· Committee constituted 22 May 2008- Decision Pending Decision on Rectification: 25 October 2008	Argentina breached fair and equitable treatment obligations under Article II(2)(a) and the "umbrella clause" at Article II(2)(c) of the BIT. Tribunal rejected Argentina's defences based on necessity and article XI of the BIT. Compensation of US$106.2 Million awarded.
2.	ARB/01/08	CMS Gas Transmission Company	Gas transmission concession agreement	US-Argentina BIT	Award: 12 May 2005 Annulment Decision: 25 September 2007	Tribunal rejected claims of expropriation under article IV and discriminatory and arbitrary treatment under article II(2)(b) of the BIT. Argentina had breached obligations to accord investor fair and equitable treatment under article II(2)(a) and the "umbrella clause" at Article II(2)(c) of the BIT. Tribunal rejected Argentina's defences of necessity under article XI of the BIT and at customary international law. Compensation of US$133.2 million awarded.
3.	ARB/01/12	Azurix Corp	Water and sewer services concession agreement	US-Argentina BIT	Award: 14 July 2006 Annulment Proceedings. Committee Constituted 14 June 2007- Decision Pending	Argentina had not expropriated the investment under IV(1). Argentina breached Article II(2)(a) of the BIT by failing to accord fair and equitable treatment Argentina failed to accord full protection and security

* Based on information at www.icsid.worldbank.org (last updated 23 October 2008)

	Case No.	Claimant	Industry	Bilateral Investment Treaty	Status of Proceedings	Finding of Tribunal
						to investment under Article II(2)(a) of the BIT. Argentina breached Article II(2)(b) of the BIT by taking arbitrary measures that impaired Azurix's use and enjoyment of its investment. Compensation of US$165,240,753 awarded.
4.	ARB/02/1	LG&E Energy Corp., LG&E Capital Corp., and LG&E Internacional Inc.	Gas transmission concession agreement	US-Argentina BIT	Award: 25 July 2007 (decision on liability 3 October 2006) Annulment Proceedings: Registered 19 September 2008	Argentina breached under BIT with respect to (i) the standard of fair and equitable treatment and the prohibition to accord treatment less favorable than that required by international law under Article II(2)(a); (ii) the prohibition of discriminatory measures under Article II(2)(b); and (iii) the obligations covered by the "umbrella clause" under Article II(2)(c). Argentina's conduct was justified under Article XI of BIT and exempted from responsibility from 1 December 2001 until 26 April 2003. Argentina was liable for damages to LG&E for breaches of the BIT outside this period.
5.	ARB/02/16	Sempra Energy Internacional	Gas supply and distribution concession agreement	US-Argentina BIT	Award: 28 September 2007 Annulment Proceedings: Application for annulment registered 30 January 2008 – (Committee not established)	Argentina breached its obligations to accord the investor the fair and equitable treatment under Article II(2)(a) & breached "umbrella clause" in Article II(2)(c) of the BIT. State of necessity under customary international law & article XI of BIT not established. Compensation of US$128,250,462 awarded.

	Case No.	Claimant	Industry	Bilateral Investment Treaty	Status of Proceedings	Finding of Tribunal
6.	ARB/03/2	Camuzzi Internacional S.A.	Gas supply and distribution concession agreement	Treaty between the Argentine Republic and the Belgo-Luxembourg Economic Unit on the Promotion and Reciprocal Protection of Investments signed 28 June 1990 and entry into force 26 August 1992 (Belgium/Luxemburg-Argentina BIT)	Pending: suspension of proceedings extended by parties on 28 April 2008	
7.	ARB/02/17	AES Corporation	Electricity generation and distribution operations concession agreement	US-Argentina BIT	Pending: suspension of proceedings extended by parties on June 23 2008	
8.	ARB/03/5	Metalpar S.A and Buen Aire S.A	Manufacturing and Sale of Motor vehicles	Treaty between the Argentine Republic and the Republic of Chile on the Promotion and Reciprocal Protection of Investments, signed 2 August 1991 and entry into force 1 January 1995 (Chile- Argentina BIT)	Award: 6 June 2008	Argentina not in breach of obligations. Defence of necessity not considered.
9.	ARB/03/7	Camuzzi International S.A	Electricity distribution and transportation concession agreement	(Belgium/Luxemburg - Argentina BIT)	Settlement agreed by the parties and proceeding discontinued at their request (Order taking note of the discontinuance issued by the Tribunal on January 25, 2007 pursuant to Arbitration Rule 43(1)).	
10.	ARB/03/9	Continental Casualty Company	Insurance Company	US-Argentina BIT	Award rendered 5 September 2008	Tribunal dismissed claims relating to (i) umbrella clause; (ii) expropriation; (iii) and the requirement to protect the free transfer of assets. Argentina absolved from alleged breaches of investment treaty obligations under article XI of BIT.

	Case No.	Claimant	Industry	Bilateral Investment Treaty	Status of Proceedings	Finding of Tribunal
						With the exception of Argentina's restructuring of treasure bills held by Continental Casualty which occurred outside the period of time covered by article XI and therefore could not be considered necessary. For this act, Argentina was found to have breached the Fair and Equitable treatment standard of the BIT. Argentina liable for damages of US$ 2.8 million plus interest: a fraction of the US$ 112 million sought by the claimant.
11.	ARB/03/10	Gas Natural SDG, S.A.	Gas supply and distribution concession agreement	Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic signed in Buenos Aires on 3 October 1991 and entry into force 28 September 1992 (Spain-Argentina BIT)	Pending: As requested by the parties, the suspension of the proceeding is further extended on 20 February 2008	
12.	ARB/03/12	Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural Resources (Tierra del Fuego) S.A.	Hydrocarbon and electricity exploration and exploitation concession agreements	US-Argentina BIT	Settlement agreed by the parties and proceeding discontinued at their request (Order taking note of the discontinuance pursuant to Arbitration Rule 43(1) issued by the Tribunal on June 23, 2005)	
13.	ARB/03/13	Pan American Energy LLC and BP Argentina Exploration Company	Hydrocarbon and electricity exploration and exploitation concession agreements	US-Argentina BIT	Pending: Request for the discontinuance of proceedings pursuant to ICSID Arbitration Rule 43(1) filed on June 18, 2008	

	Case No.	Claimant	Industry	Bilateral Investment Treaty	Status of Proceedings	Finding of Tribunal
14.	ARB/03/15	El Paso Energy International Company	Hydrocarbon and electricity exploration and exploitation concession agreements	US-Argentina BIT	Pending:	
15.	ARB/03/17	Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A	Water services concession agreement	Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments, signed on 3 July 3 1991 and entry into force 3 March 1993 (France-Argentina BIT)	Pending: proposal for disqualification of an arbitrator declined 12 May 2008. Proceedings have been resumed	
16.	ARB/03/18	Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic	Water services concession agreement	France-Argentina BIT	Settlement agreed by the parties and proceeding discontinued at the request of the Claimants (Order taking note of the discontinuance issued by the Tribunal pursuant to ICSID Arbitration Rule 44 24 January 2007	
17.	ARB/03/19	Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic	Water services concession agreement	France-Argentina BIT	Pending (the parties file post-hearing briefs on June 18, 2008)	
18.	ARB/03/20	Telefónica S.A.	Telecommunications-concession agreement to provide local and international telephone and data transmission services	Spain-Argentina BIT	Pending: As requested by the parties, the suspension of the proceeding is further extended on 8 April 2008	
19.	ARB/03/21	Enersis S.A. and others	Electricity distribution concession agreement	Spain-Argentina BIT	Pending. As requested by the parties, the suspension of the proceeding is further extended on 28 March 2008	

	Case No.	Claimant	Industry	Bilateral Investment Treaty	Status of Proceedings	Finding of Tribunal
20.	ARB/03/22	Electricidad Argentina S.A. and EDF International S.A.	Electricity distribution concession agreement	France-Argentina BIT	Pending: As requested by the parties, proceedings suspended until 30 June 2008	
21.	ARB/03/23	EDF International S.A., SAUR International S.A. and Léon Participaciones Argentinas S.A	Electricity distribution enterprise concession agreement	France-Argentina BIT	Pending: the proposal for disqualification of arbitrator was declined. Proceedings resumed on June 25 2008	
22.	ARB/03/27	Unisys	Information storage and management project in judiciary	US-Argentina BIT	Pending: As requested by the parties, the suspension of the proceeding is further extended 11 December 2007	
23.	ARB/03/30	Azurix Corp.	Water and Sewer concession agreement	US-Argentina BIT	Pending: Tribunal held first session by telephone conference on 1 June 2008	
24.	ARB/04/1	Total S.A.	Gas production and distribution/power generation project	France-Argentina BIT	Pending: parties filed submissions on costs 26 May 2008	
25.	ARB/04/4	SAUR International	Water concession agreement	France-Argentina BIT	Pending: As requested by the parties, the proceeding are suspended until 31 May 2008	
26.	ARB/04/8	BP America Production Company and others	Hydrocarbon concession and electricity generation project	US-Argentina BIT	Pending: parties filed a request for the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1) on 18 June 2008	
27.	ARB/04/9	CIT Group Inc	Leasing enterprise	US-Argentina BIT	Pending: Decision on Jurisdiction 2 April 2007	
28.	ARB/04/14	Wintershall Aktiengesellschaft	Gas and oil production	Germany-Argentina BIT	Pending	

	Case No.	Claimant	Industry	Bilateral Investment Treaty	Status of Proceedings	Finding of Tribunal
29.	ARB/04/16	Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A.	Gas Production Concessions	US-Argentina BIT	Pending: the Claimants filed a second ancillary claim on 23 October 2007	
30.	ARB/04/18	France Telecom S.A.	Telecommunications concession agreement	France-Argentina BIT	Settlement agreed by the parties and proceeding discontinued (Order taking note of the discontinuance on 30 March 2006).	
31.	ARB/04/20	RGA Reinsurance Company	Financial reinsurance services	US-Argentina BIT	Settlement agreed by the parties and proceeding discontinued at their request (Order taking note of the discontinuance issued by the Tribunal on 14 September 14 2006)	
32.	ARB/ 05/1	Daimler Chrysler Services A.G.	Leasing and Financial services	Germany-Argentina BIT	Pending	
33.	ARB/05/2	Compañía General de Electricidad S.A. and CGE Argentina S.A	Electricity distribution concession agreement	Chile-Argentina BIT	Pending: As requested by the parties, the suspension of the proceeding is further extended 14 July 2008	
34.	ARB/05/5	TSA Spectrum de Argentina S.A.	Telecommunications concession	Agreement between the Argentine Republic and the Netherlands for the Promotion and Reciprocal Protection of Investments, signed on 20 October 20 1992 and entry into force 1 October 1994	Pending: Hearing on Jurisdiction held 5 May 2008	
35.	ARB/05/11	Asset Recovery Trust S.A.	Financial Sector – collection contract	Germany, US	Pending: As requested by the parties, the suspension of the proceeding is further extended 21 May 2008	

	Case No.	Claimant	Industry	Bilateral Investment Treaty	Status of Proceedings	Finding of Tribunal
36.	ARB/07/5	Giovanna a Beccara and others	Representing 195,000 Claimants in $4.4 billion claim relating to Argentina's default on the payment of sovereign bonds.	Italy-Argentina bilateral investment treaty	Pending: the Tribunal issued a decision on the scope of the jurisdictional phase on 9 May 2008	
37.	ARB/07/8	Giovanni Alemanni and others	Bonds	Italy-Argentina bilateral investment treaty	Pending: Tribunal recently constituted	
38.	ARB/07/17	Impregilo S.p.A	Water Concession	Unknown	Pending: The Tribunal holds a first session by telephone conference on 16 July 2008	
39.	ARB/07/26	Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa	Water Concesión	Unknown	Pending: Tribunal recently constituted	
40.	ARB/07/31	HOCHTIEF Aktiengesellschaft	Highway system construction contract	Unknown	Pending: Tribunal recently constituted	
41.	ARB/08/14	Impregilo S.p.A. v. Argentine Republic	Highway construction concession contract	Unknown	Pending: Tribunal not yet constituted	
42.	ICSID Case No. ARB/08/9	Giordano Alpi and others v. Argentine Republic	Bonds	Unknown	Pending: Tribunal not yet constituted	

Appendix 2
Table of Bilateral Investment Treaties with the Republic of Argentina

APPENDIX 2

Table of Bilateral Investment Treaties with the Republic of Argentina*

	Partner State	Signed	Entry into Force
1.	Albania	21 June 2006	
2.	Algeria	04 October 2000	28 January 2002
3.	Armenia	16 April 1993	20 December 1994
4.	Australia	23 August1995	11 January 1997
5.	Austria	07 August1992	01 January 1995
6.	Belgium and Luxembourg	28 June 1990	20 May 1994
7.	Bolivia	17 March 1994	01 May 1995
8.	Bulgaria	21 September1993	11 March 1997
9.	Canada	05 November 1991	29 April 1993
10.	Chile	02 August1991	01 January 1995

* Based on information from: http://www.unctad.org/sections/dite_pcbb/docs/argentina.pdf and SICE: Foreign Trade Information Systems at http://www.sice.oas.org/ctyindex/ARG/ARGBITS_e.asp (23 October 2008)

	Partner State	Signed	Entry into Force
11.	China	05 November 1992	01 August 1994
12.	Costa Rica	21 May 1997	01 May 2001
13.	Croatia	02 December 1994	01 June 1996
14.	Cuba	30 November 1995	01 June 1997
15.	Czech Republic	27 September1996	23 July 1998
16.	Denmark	06 November 1992	02 February 1995
17.	Dominican Republic	16 March 01	
18.	Ecuador	18 February1994	01 December 1995
19.	Egypt	11 May 1992	03 December 1993
20.	El Salvador	09 May 1996	08 January 1999
21.	Finland	05 November 1993	03 May 1996
22.	France	03 July 1991	03 March 1993
23.	Germany	09 April 1991	08 November 1993

	Partner State	Signed	Entry into Force
24.	Greece	26 October 1999	
25.	Guatemala	21 April 1998	07 December 2002
26.	Hungary	05 February1993	01 October 1997
27.	India	20 August1999	12 August 2002
28.	Indonesia	07 November 1995	01 March 2001
29.	Israel	23 July 1995	10 April 1997
30.	Italy	22 May 1990	14 October 1993
31.	Jamaica	08 February1994	01 December 1995
32.	Korea, Republic	17 May 1994	24 September 1996
33.	Lithuania	14 March 1996	01 September 1998
34.	Malaysia	06 September 1994	20 March 1996
35.	Mexico	13 November 1996	22 June 1998
36.	Morocco	13 June 1996	19 February 2000

	Partner State	Signed	Entry into Force
37.	Netherlands	20 October 1992	01 October 1994
38.	New Zealand	27 August 1999	
39.	Nicaragua	10 August 1998	01 February 2001
40.	Panama	15 September 2004	15 September 2004
41.	Peru	10 November 1994	24 October 1996
42.	Philippines	20 September 1999	01 January 2002
43.	Poland	31 July 1991	01 September 1992
44.	Portugal	06 October 1994	03 May 1996
45.	Romania	29 July 1993	01 May 1995
46.	Russian Federation	25 June 1998	20 November 2000
47.	Senegal	06 April 1993	
48.	South Africa	23 July 1998	01 January 2001
49.	Spain	03 October 1991	28 September 1992

	Partner State	Signed	Entry into Force
50.	Sweden	22 November 1991	28 September 1992
51.	Switzerland	12 April 1991	06 November 1992
52.	Thailand	18 February 2000	07 March 2002
53.	Tunisia	17 June 1992	23 January 1995
54.	Turkey	08 May 1992	01 May 1995
55.	Ukraine	09 August1995	06 May 1997
56.	United Kingdom	11 December 1990	19 February 1993
57.	United States	14 November 1991	20 October 1994
58.	Venezuela	16 November 1993	01 July 1995
59.	Vietnam	03 June 1996	01 June 1997

Appendix 3
The Argentine Crisis: A Chronology of Significant Events

APPENDIX 3

The Argentine Crisis: A Chronology of Significant Events*

Date	Summary of events
1980's	Argentina suffers an extended period of economic instability including hyperinflation.
1989	Carols Menem elected President of Argentina. Menem appoints Domingo Cavallo as Minister of Economy. They undertake a major restructure of Argentina's economy including tax reform, privatization and the adoption of a currency board.
1 April 1991	Convertibility law enacted which provides the legal basis for currency board and establishes convertibility of the Argentine Currency to the US dollar at a one-to-one fixed exchange rate.[1]
1991-1994	Argentine enjoys strong economic growth and the currency board is considered highly successful.
1995	The Mexican economic crisis (Tequila Crisis) causes a brief recession to the Argentine economy, GDP decline 2.8%. The economy rebounds and foreign investment increases.
May 1995	Menem reelected President.
1996-1997	Renewed economic growth but account deficit and debt measures worsen.
July 1996	Roque Fernández replaces Cavallo as Economy Minister.
1997	Financial crises in Asia. Although relatively stable, Argentina negotiates a "precautionary" program with the IMF to provide an emergency loan. Argentina's debt burden is growing.
August - September 1998	Russia's default on its government debt causes financial markets to tumble worldwide. Prolonged period of appreciation of US dollar affects Argentina's competitiveness in trade. Argentina enters recession and unemployment rises.
January 1999	Brazil devalues its currency and Argentina's exports to Brazil

* Information from Hornbeck J F & Marshall M K, "The Argentine Financial Crisis: A Chronology of Events" CRS Report for Congress, RS31582, 5 June 2005, except where otherwise indicated

[1] Law No. 25.561 *Public Emergency and Reform to the Provisions about Exchange Rate* of 6 January 2002, *Boletin Oficial de la Republica Argentina*, 07 January 2002

	fall. World prices for wheat and other Argentine exports decline.
October 1999	The end of Menem's presidency and the election of President De la Rua.[2] In an attempt to decrease the fiscal deficit De la Rua's government imposes the first significant tax increases.
29 May 2000	Government announces $1 billon in budget cuts in expectation that fiscal responsibility will bring renewed confidence to economy. Cuts trigger a 20,000 person protest.
December 2000	Strong doubts about sustainability of debt cause the government to seek assistance from IMF. A $30 billion multilateral assistance package from the IMF, multilaterals, private banks and the Spanish government is agreed to ensure funding for the following 12 to 24 months.
12 January 2001	Poor economic performance prompts IMF to augment loan agreement by US$ 7 billion.
2 March 2001	Economic Minister Jose Luis Machinea resigns and Ricardo Lopez-Murphy appointed.
19 March 2001	Two weeks after appointment Ricardo Lopez-Murphy is replaced by Domingo Cavallo (his second time as Economy Minister)
16-17 June 2001	De la Rua government announces a $29.5 voluntary debt swap (*megacanje*)[3] in an attempt to restructure Argentina's massive foreign debt. The swap consisted of an exchange of debt bonds for others at longer maturities with higher interest rates.[4]
June 2001	The Convertibility exchange rate is adjusted to an evenly divided dollar-euro peg for foreign trade, providing an effective 7% devaluation. Under the system export subsidies and import tariffs are calculated on a euro/dollar exchange rate whilst the exchange rate for financial operations maintained as a 1:1 dollar for peso exchange.[5] Instead of improving Argentina's competitiveness the market reacts negatively to government interference with convertibility

[2] De la Rua's election followed a messy political campaign which saw another candidate Duhalde and Menem coming into conflict over Duhalde's focus on restructuring foreign debt a move which ironically many Argentines' considered would threaten Argentina's hard won economic stability and which arguably cost Duhalde the election.

[3] Canje is Spanish for swap- "big swap"

[4] IMF, Policy Development and Review Department *Lessons from the Crisis in Argentina* 8 October 2003, 77

[5] Hornbeck J F, "The Argentine Financial Crisis: A Chronology of Events" CRS Report for Congress, RS21130, 31 January 2002

	system.
July 2001	"Zero Deficit Law" announced which requires a balanced budget by fourth quarter of 2001.[6]
August 2001	An agreement for an US$8 billion package with the IMF reached.[7]
1 November 2001	Argentina announces plan for debt restructure.[8]
28 to 30 November 2001	Capital flight (Bank Run), fearing an economic crash and possible devaluation banks begin to experience a significant withdrawal of dollars from banks. Central bank reserves fall by $2 billion in one day.
3 December 2001	Bank Deposit Freeze (Corralito) introduced, imposing controls on deposit withdrawals and outflow of funds from Argentina.[9] Deposit withdrawals limited to $1,000 (pesos) per month. Cross-border transfers restricted to foreign trade transactions and credit card international clearing. Widespread protests begin over bank withdrawal limitations.
5 December 2001	IMF withhold $1.24 loan installment, due to Argentina's repeated inability to meet fiscal targets.
7 December 2001	Government requires that proceeds of exports be transferred to Argentina. Funds can be maintained in the original currency. [10] Argentina announces it can no longer guarantee payment on foreign debt.
14 December	Supermarket looting begins.
19 December	Rioting spreads to major cities, government declares a state of emergency. Minister of Economy Domingo Cavallo resigns
20 – 21 December 2001	Following mass riots, looting and demonstrations over two dozen people are left dead. President De la Rua resigns and Ramon Puerta is elected provisional president.
24 December 2001	Rodriguez Saa appointed as president, in his inaugural speech

[6] IMF, Policy Development and Review Department *Lessons from the Crisis in Argentina* 8 October 2003, 77

[7] IMF, Policy Development and Review Department *Lessons from the Crisis in Argentina* 8 October 2003, 77

[8] IMF, Policy Development and Review Department *Lessons from the Crisis in Argentina* 8 October 2003, 77

[9] Financial Entities Decree 1570/01 on 1December 2001, *Boletin Oficial de la Republica Argentina*, 29787, 3 December 2001

[10] Standard and Poor's "The Argentina Crisis: A chronology of Events After the Sovereign Default", Carina Lopez (Analyst), 12 April 2002

	he announces that payments of Argentina's external debt to private foreign creditors are to be suspended.[11]
30 December 2001	Rodriguez Saa resigns from presidency following continued rioting and loss of party support. Ramon Puerta resigns to avoid re-appointment. No immediate successor emerges to take over presidency.
1 January 2002	Eduardo Duhalde appointed president.
6 January 2002	The Duhalde Government terminates convertibility under the Economic Emergency Law.[12] Peso is officially devalued by 29% (to 1:4 with the US dollar) for major foreign transactions, with a floating rate for all other transactions. Other provisions of the law include: • A public emergency until 10 December 2003 • Pesification of debts with original amounts below $100,000 (passing devaluation costs to creditors) • The right of adjustment of tariffs according to US PPI and other obligations emerging from private contracts abolished. This measure was to take place for 180 days during which time agreements and renegotiations were to take place
10 January 2002	Government guarantees dollar denominated deposits, but to curtail bank runs maintains a US$1000 limit on monthly withdrawals and all checking accounts exceeding $10,000 and savings accounts exceeding $3,000 converted to certificate so deposit and frozen for at least one year. Smaller deposits can be withdrawn as pesos at 1:4 exchange rate.[13] Central Bank regulation of foreign exchange markets issued prohibited cross-border transfers unless the issuers acquired the dollars in the "free market"; that is, if the transfer did not imply a reduction in the Central Bank reserves. The scarcity of dollar bills and small operations, makes it virtually impossible for companies to acquire the necessary amounts of dollars to pay obligations abroad.[14]

[11] IMF, Policy Development and Review Department *Lessons from the Crisis in Argentina* 8 October 2003, 77

[12] Law No. 25.561 *Public Emergency and Reform to the Provisions about Exchange Rate* of 6 January 2002, *Boletin Oficial de la Republica Argentina*, 7 January 2002

[13] Hornbeck J F, "The Argentine Financial Crisis. A Chronology of Events" *CRS Report for Congress*, RS21130, 31 January 2002

[14] Standard and Poor's "The Argentina Crisis: A chronology of Events After the Sovereign Default", Carina Lopez (Analyst), 12 April 2002

11 January 2002	Foreign currency markets open after three weeks and peso falls to 1.80 per US dollar.[15]
15 January 2001	Peso falls as low as 2.05 per US dollar.[16]
19-20 January	Duhalde reverses guarantee of dollar denominated deposits, which will be converted to pesos.
24 January 2002	Utility tariffs frozen indefinitely.[17]
11 February 2002	Foreign exchange market opens for the first time with a fully floating peso.
14 February 2002	20 % duty on energy exports established. The Emergency Law envisaged a renegotiation of licences to be conducted by a Renegotiation Commission.[18] In meeting with IMF officials, Argentine representatives suggest that the country will need $22-23 billion in assistance.
18 February 2002	Unemployment reaches 22%, general protests erupt into violent attacks on banks over continued restrictions on withdrawals.
28 February 2002	Significant inflation; consumer prices and wholesale prices increased 3.1% and 11% respectively, despite the continuing deep recession. Poverty soars across the country.
4 March 2002	Tax on farm and manufactured exports imposed. Proceeds to be used to bolster social programs.
5 March 2002	The government announces its will issue $44 billion in dollar- and peso-denominated bonds to banks and depositors for losses incurred from the mismatch in peso conversion between loans and deposits.
18 April 2002	Scotiabank (Canada) becomes first bank to cease operations in Argentina.
24 April 2002	Argentina signs a 14-point plan that meets all the major IMF goals needed for lending to resume.
11-13 May 2002	Argentina uses foreign exchange reserves to make $159 million repayment to IMF and $680 million repayment to the World

[15] IMF, Policy Development and Review Department *Lessons from the Crisis in Argentina* October 8, 2003, 79

[16] Hornbeck J F, "The Argentine Financial Crisis: A Chronology of Events" *CRS Report for Congress*, RS21130, 31 January 2002

[17] IMF, Policy Development and Review Department *Lessons from the Crisis in Argentina* 8 October 2003, 79

[18] Procedures defined by Decree No. 293/2002

	Bank.
19 May 2002	State-owned Banco Nacion takes over three French banking affiliates, portending a deeper banking system crisis.
21 May 2002	IMF grants a one-year extension on $130 million payment due. Argentina is scheduled to repay $4.8 billion to IMF in 2002.
22 May 2002	Economy Minister Lavagna meets with IMF Managing Director Horst Koehler, who suggests the need for further reform. Argentine peso sinks to 3.6 to the dollar, down 72% since the financial crisis began.
26 June 2002	In response to the government's IMF-oriented economic policy, protests result in 90 injuries and 2 deaths.
25 June 2002	Argentina's Economy Minister Roberto Lavagna announces that Argentine utilities can expect tariff adjustments to be progressive. Argentina's four mobile operators (Telecom Personal, Unifon, CTI Movil, Movicom Bellsouth) raise rates up to 15% to offset losses from the devaluation of the peso.
29 July 2002	The Independent Advisory Group on Argentina submits their report, entitled "Economic and Financial Issues Facing Argentina," to the Government of Argentina and the IMF, concluding that Argentina should adopt: 1) a monetary anchor to achieve price stability; 2) a formal inflation targeting policy, and; 3) a fully credible independent central bank.
5 September 2002	The Executive Board of the IMF grants Argentina a one-year extension on a $2.8 billion payment due September 9.
17 September 2002	President Eduardo Duhalde issues decree to extend the period in which the Economy Ministry and public utility contract holders can negotiate rate hikes.
19 September 2002	Government statistics show that GDP decreased by 15% (annualized basis) in the first half of the year. Four-year recession and financial crisis reported as having cost Argentina ten years of economic growth.
24 September 2002	Ongoing debate regarding payment of debt to multilateral institutions. Argentina is scheduled to make an $800 million payment to the World Bank in October 2002. A default would fully isolate the country from all international financial lending.
25 September 2002	The Argentine government gives banks $8 billion worth of bonds to help compensate for losses incurred with the uneven conversion of banks assets and liabilities related to the January 2002 devaluation.

18 October 2002	President Duhalde resigns effective May 25, 2003.
25 November 2002	11-month restriction on peso denominated bank withdrawals (*corralito*), affecting $6 billion of deposits ended. Restrictions on long-term certificates of deposit and the freeze on dollar-denominated accounts (*corralon*) remain in effect. Utility rates rise by 10% for residential and commercial users, industry will see increases of 12-16%. Prices had been frozen since January as part of an effort to fight an expected rise in inflation.
18 December 2002	Argentina makes "good faith" gesture with $124 million payment, split between the IMF ($28 million), World Bank ($41 million), and Inter-American Development Bank (IDB) ($55 million). Continues to owe large balances to each.
8 January 2003	Argentina removes year-old restrictions on foreign exchange trading (that limited payments for imports and profit remittances) as requested by the IMF.
24 January 2003	The IMF Executive Board formally approves transitional loan to Argentina. Argentina pays arrears of $797 million to the World Bank and $770 million to the IDB.
28 March 2003	All remaining bank deposits under the *corralon* released over a three-month time period.
8 April 2003	The Argentine government lifts restrictions on the first portion (6.8 billion pesos) of fixed-term, dollar-denominated bank deposits frozen under the *corralon*. Agrees to issue bonds to compensate depositors for the difference in value due to the earlier forced conversion to pesos and inflation.
25 May 2003	Néstor Kirchner inaugurated as President of Argentina.

Appendix 4

Treaty between United States of America and The Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment

APPENDIX 4

Treaty between United States of America and The Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment *

Signed November 14, 1991; Entered into Force October 20, 1994

The United States of America and the Argentine Republic, hereinafter referred to as the Parties;

Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources;

Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights; and

having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

---

* Source United Nations Conference on Trade and Development at: http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf

(iii) a claim to money or a claim to performance having economic value and directly related to an investment;

(iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law;

b) "company" of a Party means any kind of corporation, company, association, state enterprise, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, and whether privately or governmentally owned;

c) "national" of a Party means a natural person who is a national of a Party under its applicable law;

d) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capita gain; royalty payment; management, technical assistance or other fee; or returns in kind;

e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase, issuance, and sale of equity shares and other securities, and the purchase of foreign exchange for imports.

f) "territory" means the territory of the United States or the Argentine Republic, including the territorial sea established in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea. This Treaty also applies in the seas and seabed adjacent to the territorial sea in which the United States or the Argentine Republic has sovereign rights or jurisdiction in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea.

2. Each Party reserves the right to deny to any company of the other Party the advantages of this Treaty if (a) nationals of any third country, or nationals of such Party, control such company and the company has no substantial business activities in the territory of the other Party, or (b) the company is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

ARTICLE II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

2. a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.
b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party.
c) Each Party shall observe any obligation it may have entered into with regard to investments.

3. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

4. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

5. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations.

7. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

8. The treatment accorded by the United States of America to investments and associated activities of nationals and companies of the Argentine Republic under the provisions of this Article shall in any State, Territory or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of, other States, Territories or possessions of the United States of America.

9. The most favored nation provisions of this Article shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of that Party's binding obligations that derive from full membership in a regional customs union or free trade area, whether such an arrangement is designated as a customs union, free trade area, common market or otherwise.

ARTICLE III

This Treaty shall not preclude either Party from prescribing laws and regulations in connection with the admission of investments made in its territory by nationals or companies of the other Party or with the conduct of associated activities, provided, however, that such laws and regulations shall not impair the substance of any of the rights set forth in this Treaty.

ARTICLE IV

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-) except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefore, conforms to the provisions of this Treaty and the principles of international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded

treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.

ARTICLE V

1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article IV; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement directly related to an investment; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

2. Except as provided in Article IV paragraph 1, transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred. The free transfer shall take place in accordance with the procedures established by each Party; such procedures shall not impair the rights set forth in this Treaty.

3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

ARTICLE VI

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

ARTICLE VII

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such convention: or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNICTRAL): or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.

ARTICLE VIII

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Permanent Court of Arbitration.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

4. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties.

ARTICLE IX

The provisions of Article VII and VIII shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the

United States or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

ARTICLE X

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

ARTICLE XI

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.

ARTICLE XII

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Article VII and VIII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article IV;

(b) transfers, pursuant to Article V; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII(l)(a) or (b),

to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

ARTICLE XIII

This Treaty shall apply to the political subdivisions of the Parties.

ARTICLE XIV

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

4. The Protocol shall form an integral part of the Treaty.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at Washington on the fourteenth day of November, 1991, in the English and Spanish languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA:

FOR THE ARGENTINE REPUBLIC:

PROTOCOL

1. During dispute settlement proceedings pursuant to Article VII, a party may be required to produce evidence of ownership or control consistent with Article I(l)(a).

2. With reference to Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions to national treatment in the following sectors:

air transportation; ocean and coastal shipping; banking; insurance; energy and power production; custom house brokers; ownership and operation of broadcast or common carrier radio and television stations; ownership of real property; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources

3. With reference to Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions to national treatment with respect to certain programs involving government grants, loans, and insurance.

4. With reference to Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions to national and most favored nation treatment in the following sectors, with respect to which treatment will be based on reciprocity:

mining on the public domain; maritime services and maritime-related services; primary dealership in United States government securities.

5. With reference to Article II, paragraph 1, the Argentine Republic reserves the right to make or maintain limited exceptions to national treatment in the following sectors:

real estate in the Border Areas; air transportation; shipbuilding; nuclear energy centers; uranium mining; insurance; mining; fishing.

6. The Parties understand that, with respect to rights reserved in Article XI of the Treaty, "obligations with respect to the maintenance or restoration of international peace or security" means obligations under the Charter of the United Nations.

7. The Parties acknowledge and agree that, to the extent of any conflict or inconsistency between the terms of this Treaty, and the terms of the Treaty of Friendship, Commerce, and Navigation between the Parties, entered into force December 20, 1854 (the "FCN Treaty-), the terms of this Treaty shall supersede the terms of the FCN Treaty, and shall control the resolution of such conflict.

8. The Parties confirm their mutual understanding that the provisions of this Treaty do not bind either Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of this Treaty.

9. Notwithstanding Article II(5) and in accordance with the terms of this paragraph, the Government of the Argentine Republic may maintain, but not intensify, existing performance requirements in the automotive industry. The Government of the Argentine Republic shall exert best efforts to eliminate all such requirements within the shortest possible period, and shall ensure their elimination within eight years of the date of the entry into force of this Treaty. The Government of the Argentine Republic shall further ensure that such performance requirements are applied in a manner which does not place existing investments at a competitive disadvantage against new entrants in this industry. The Parties shall consult at the request of either on any matter concerning the implementation of these undertakings. For the purposes of this paragraph, "existing" means extant at the time of signature of this Treaty.

10. The Parties note that the Argentine Republic has had and may have in the future a debt-equity conversion program under which nationals or companies of the United States may choose to invest in the Argentine Republic through the purchase of debt at a discount.

The Parties agree that the rights provided in Article V, paragraph 1, with respect to the transfer of returns and of proceeds from the sale or liquidation of all or any part of an investment, remain or may be, as such rights would apply to that part of an investment financed through a debt-equity conversion, modified by the terms of any debt-equity conversion agreement between a national or company of the United States and the Government of the Argentine Republic, or any agency or instrumentality thereof.

The transfer of returns and of proceeds from the sale or liquidation of all or any part of an investment shall in no case be on terms less favorable than those accorded, in like circumstances, to nationals or companies of the Argentine Republic or any third country, whichever is more favorable.

11. The Parties note with satisfaction that the Argentine Republic is engaged in a process of privatization of various industries, including public utilities. They agree that they will undertake their best efforts, including through consultations, to avoid any misinterpretation regarding the scope of Article II(5) that would adversely affect this privatization process.

Embassy of the United States of America

Buenos Aires, August 24, 1992

No. 453

Mr. Minister:

I have the honor to refer to the Treaty between the United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment, with Protocol signed at Washington, November 14, 1991 ("The Treaty").

During the negotiation of the Treaty, the Government of the United States of America and the Government of the Argentine Republic discussed the inclusion in Section 5 of the Protocol to the Treaty of the Argentine Mining Sector. Based on those discussions and subsequent discussions regarding this matter, I wish to propose the deletion of the term "Mining" from the list of sectors in Section 5 of the Protocol.

If the foregoing is acceptable to your Government, I have the honor to propose that this note, together with your reply to that effect shall constitute an agreement between the two Governments amending the Treaty, which shall be subject to ratification.

Accept, Mr. Minister, the renewed assurances of my highest consideration.

Dr. Guido Di Tella,

Minister of Foreign Affairs and Worship,

Buenos Aires.

DEPARTMENT OF STATE
OFFICE OF LANGUAGE SERVICES
Translating Division

LS No. 140114

LM

SPA/ENG

Minister of Foreign Relations and Worship

Buenos Aires, November 6, 1992

Mr. Ambassador:

I have the honor to address you with regard to your note dated August 24, 1992, which reads as follows:

[The Spanish translation of Ambassador Todman's note of August 24, 1992, agrees in all substantive respects with the original English text.]

In that regard I wish to state that my Government agrees with the terms of the transcribed note and, therefore, I have the honor to inform you that the aforesaid note and this reply constitute an agreement between out two Governments that will enter into force open the exchange of instruments of ratification.

Accept, Sir, the assurances of my highest consideration.

[Signature]

His Excellency

Terence Todman,

Ambassador of the United States of America,

Buenos Aires, Argentina

Table of Cases

ICSID Awards*

AES Corporation v Argentina ICSID Case No ARB/02/17 (Decision on Jurisdiction)

Amco v Indonesia ICSID Case No ARB/81/1 (Decision on Annulment), 25 ILM 1439 (1986)

Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka ICSID Case No ARB/87/3, 30 ILM 577 (1991)

Azurix Corp v Argentina ICSID Case No ARB/01/12

CDC Group plc v Republic of Seychelles ICSID Case No ARB/02/14

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v The Argentine Republic ICSID Case No ARB/97/3

El Paso Energy International Company v The Republic of Argentina ICSID Case No ARB/03/15 (Decision on Jurisdiction)

Emilio Agustín Maffezini v Kingdom of Spain ICSID Case No ARB/97/7

Empresa Nacional de Electricidad S.A. (Chile) v The Argentine Republic ICSID Case No ARB/99/4

Houston Industries Energy Inc. and others (US) v The Argentine Republic ICSID Case No ARB/98/1

Joy Mining Machinery Limited v Arab Republic of Egypt ICSID Case No ARB/03/01 (Decision on Jurisdiction)

KlöcknerIndustrie-Anglagen GmbH and others v United Republic of Cameroon & Société Camerounaise des Engrais ICSID Case No ARB/81/2 (Decision on Annulment)

Lanco International (US) v the Argentine Republic ICSID Case No ARB/97/6

Maritime International Nominees Establishment v Republic of Guinea ICSID Case No ARB/84/4 (Decision on Annulment) (*MINE Case*)

---

*This table does not include the Argentine Cases which are listed at Appendix 1.

Unless an alternate source is provided all awards are accessible at http://icsid.worldbank.org

MTD Equity Sdn Bhd. & MTD Chile S.A v The Republic of Chile ICSID Case No ARB/01/7 (Annulment Proceedings Decision on the Respondent's Request for a Continued Stay of Execution)

Patrick Mitchell v Democratic Republic of the Congo ICSID Case No ARB/99/7

Repsol YPF Ecuador, S.A. v Empresa Estatal Petroleos Del Ecuador (Petroecuador) ICSID Case No ARB/01/10 (Decision on Annulment)

Tecnicas Medioambientales Tecmed SA v United Mexican States ICSID Case No ARB(AF)/00/2

Saipem SpA v Bangladesh ICSID Case No ARB/05/07 (Decision on Jurisdiction)

SGS Société Générale de Surveillance S.A v Islamic Republic of Pakistan ICSID Case No ARB/01/13

SGS Société Générale de Surveillance S.A v Republic of Philippines ICSID Case No ARB/02/6

Siemens AG v Argentine Republic ICSID Case No ARB/02/08

Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt ICSID Case No ARB/84/3 (Decision on Jurisdiction 1)

Wena Hotels Limited v Arab Republic of Egypt ICSID Case No ARB/98/4 (Decision on Annulment), 41 ILM 933 (2002) (*Wena v Egypt*)

International Court of Justice

Cameroon v Nigeria, 10 October 2002, ICJ Reports 125

Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark ICJ Reports 1969, 3; 41 ILR 29

Gabcíkovo-Nagymaros Project Case (Hungary/ Slovakia) Judgment, 25 September 1997, ICJ Reports 7

Indonesia/Malaysia Case, ICJ Reports, 2002

Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports 136

Libya/Chad Case, ICJ Reports, 1994; 100 ILR 1

Maritime Delimitation and Territorial Questions Case (Qatar v Bahrain) 1994 ICJ Reports 112

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Merits, Judgment, ICJ Reports, 1986

North Sea Continental Shelf Cases (*Federal Republic of Germany v Denmark; Nuclear Tests* Cases, ICJ Reports, 1969, 41 ILR 29

Oil Platforms Case *(Iran v US)*, Judgement, 1996 ICJ 803 (12 December)

Temple of Preah Vihear Case ICJ Reports 1962, 6

Tunisia/Libya Continental Shelf Case, ICJ Reports, 1982; 67 ILR 4

Other Cases

AIG Capital Partners Inc and another v Republic of Kazakhstan (National Bank of Kazakhstan intervening)[2005] EWHC 2239 (Comm)[2006] 1 All ER

CME Czech Republic BV (The Netherlands) v Czech Republic (Partial Award) 9 ICSID Rep 121 (UNCITRAL, 2001): (Final Award) 9 ICSID 264 (UNCITRAL, 2003)

Eastern Greenland Case Permanent Court of International Justice Ser. A/B, No 53 (1933)

Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, PCIJ, Ser B, No 10

German Interests in Upper Silesia, merits, PCIJ, judgment no. 7, Serie A

Handyside v United Kingdom, 24 Eur. CT.H.R. (ser. A) (1976)

The Inter-American Court of Human Rights, Advisory Opinion on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, OC-14/94, Ser A, No 14, par 35, 116 ILR 320

Orinco Steamship Company Permanent Court of Arbitration, October 25, 1910 (*The Hague Court Reports* at 226)

Rio Martin Case 2 RIAA 615

Ronald Lauder v Czech Republic (Award) 9 ICSID Rep 62 (UNCITRAL, 2001)

Thailand-Restriction on Importation of and Internal Taxes on Cigarettes 75, DS10/R (Oct. 5, 1990), GATT B.I.S.D. (37th Supp) at 200, 222 (1990)

Tinoco Arbitration (1923) 1 UNRIAA 371

Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline,* WT/DS2 B/R (April 29, 1996); 35 ILM 603, 627 (1996)

The Republic of Argentina

Cabrera, Gerónimo, Rafael y otro c/ Poder Ejecutivo Nacional, 13 July 2004

Cafes La Virginia S.A., Fallos 317:1282, 10 October 1994

Ekmedjian, Miguel A. c/Sofovich, Gerado y Otros, Fallos 315:1492, 7 July 1992

Entidad Binacional Yaciretá c/ Eriday y otros s/ proceso de conocimiento Juzgado de 1a. instancia en lo Contencioso Administrativo Federal No.3, Secretaria No. 5, Causa 26.2444/04, 27 September 2004

EN-Procuración de Tesoro v Camara de Comercio Internacional (Argentina v ICC) Lexis No 35010977

Fibraca Constructora S.C.A. c/ Comisión Técnia Mixta de Salto Grande, Fallos:316:1669, 7 July 1993

Hagelin, Ragnar c/Estado Nacional, Fallos 316:2176, 27 December 1993

José Cartellone Construcciones SA v Hidroelectrica Norpatagonia SA o hidronor SA s/proceso de conocimiento, CSJN - 01/06/2004 J87. XXXVII

Table of Instruments

The Republic of Argentina*

Accession to the Vienna Convention, Law 19865 of 10 March 1972, *Boletin Oficial de la Republica de Argentina*, 11 January1973

Changes to Denomination and Value of Currency, Decree 2128/91 of 10 October 1991, *Boletin official de la Republica Argentina*, 17 October 1991

Constitution of the Argentine Nation (*Constitución de la Nación Argentina*) 1853, revised 1994 at http://www.senado.gov.ar/web/consnac/consnac.htm (6 November 2008)

Convertibility of the Austral, Law 23.928 of 27 March 1991, *Boletin Oficial de la Republica Argentina*, 27104, 28 March1991

Emergency Act, Chapter IV Foreign Investment Regime, Law 23697 of 15 September 1989, *Boletin Oficial de la Republica Argentina*, 25 September 1989

Financial Entities Decree, 1570/01 of 1 December 2001, *Boletin Oficial de la Republica Argentina*, 29787, 03 December 2001

Foreign Investment Act, Law 21.382 of 12 August 1976, *Boletin Oficial de la Republica de Argentina*, 19 August 1976 as amended by Law 22.208 (1980); Law 23.697 (1989); Law 23.760 (1990) & Decree 1852 (1993)

Gas Regulation, Law 24.076 of 07 June 1991, *Boletin Oficial de la Republica Argentina*, 12 June 1992

Decree 1738/92 of 18 September 1992, *Boletin Oficial de la Republica Argentina*, 28 September 1992

Decree 2255/92 of 2 December 1992, *Boletin Oficial de la Republica Argentina,* 7 December 1992

Law 20.548 at article 7 (ADLA XXXIII-D-3657), modifying law 11.672

National Civil and Commercial Procedural Code (*Codigo Procesal, Civil y Commercial de la Nacion*), Law 17.454, Buenos Aires, 18 August 1981, *Boletin Oficial*, 27 August 1981

---

*__Candidate citation note__: The candidate has endeavoured to identify consistent and accurate citation for legal instruments of the Republic of Argentina, however has not always been successful. All efforts have been made to provide consistency in this thesis.

This table does not include Argentina's Bilateral Investment Treaties which are listed at Appendix 2.

National Civil Code (*Codigo Civil*), Law 340 Buenos Aires, 25 September 1869 at http://www.saij.jus.gov.ar/download/grt_nacion/grt_codigo_civil.html

Public Emergency and Reform to the Provisions about Exchange Rate, Law 25.561 06 January 2002, Boletin Oficial de la Republica Argentina, 07 January 2002

State Reform Act, Law 23.696 18 August 1989, *Boletin Oficial de la Republica Argentina*, 26702, 23 August 1989

United Kingdom

Arbitration Act 1996
The State Immunity Act 1978

United State of America

Foreign Sovereign Immunities Act 1976

Australia

Foreign States Immunities Act 1985

International Instruments

Agreement on Trade Related Investment Measures (TRIMs) (entered into force January 1995)

Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (entered into force January 2007)

Buenos Aires Protocol on the Promotion and Protection of Investment Proceeding from Non-Member Countries of the MERCOSUR (1994)

Colonia Protocol on the Reciprocal Promotion and Protection of Investments in MERCOSUR (17 December 1994)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (entered into force 7 June 1959) at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (entered into 14 October 1966)

European Convention on Human Rights and Fundamental Freedoms CETS No 005, Rome, 4/11/1950 (entered into force 3 September 1953)

General Agreement on Trade in Services (GATS) (entered into force January 1995) 1869 UNTS 183; 33 ILM 1167 (1994)

ICSID Rules of Procedure for Arbitration Proceedings

International Chamber of Commerce Rules of Arbitration (entered into force 1 January 1998)

Montevideo Protocol on Trade in Services in the MERCOSUR (15 December 1997)

North American Free Trade Agreement (entered into force 1 January 1994) 32 ILM 289, 605 (1993)

Statute of the International Court of Justice 1945 (entered into force 24 October 1945) 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945)

Treaty of Asuncion, between Argentina, Brazil, Paraguay & Uruguay establishing a common market MERCOSUR (Mercado Comun del Sur or Mercosur) 26 March 1991, 30 ILM 1041 (1991) (entry into force 31 December 1994)

Treaty of Amity, Economic Relations, and Consular Rights, US—Iran, August 15, 1955 (entered into force 16 June 1957) 8 U.S.T. 899, 284 U.N.T.S.93

United Nations Commission on International Trade Law Arbitration Rules (General Assembly Resolution 31)

United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 at http://untreaty.un.org/English/Notpubl/English_3_13.Pdf

Vienna Convention on the Law of Treaties 1969 (entered into force 27 January 1980) UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969)

United Nations General Assembly Resolutions

Permanent Sovereignty over Natural Resources, United Nations General Assembly Resolution 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962) available at http://www1.umn.edu/humanrts/instree/c2psnr.htm (20 April 2007)

United Nations General Assembly Resolution 3041 (XXVII) endorsing the Trade and Development Board's resolution 88 (XII) of October 19, 1972

United Nations General Assembly Resolution 3281, U.N. GAOR, 29th Sess., Supp. No.31, at 50, U.N. Doc. A/9631 (1974)

Draft & Model Rules

Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, par 43, UN Doc A/56/10 (2001)

Organization for Economic Co-operation and Development (OECD) *Draft Convention on the Protection on Foreign Property* 1967

United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (amended 2006) at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdfhttp://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (6 November 2008)

US Model BIT 2004
http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (1 October 2008)

Correspondence in ICSID Proceedings

Letter from Argentina, Procuracion del Tesoro de la Nacion, to Claudia Frutos-Peterson, Secretary of the ad hoc Committee, 2 June 2008, Re Siemens AG v Argentina (ICSID Case No ARB/02/08)

Letter from Osvaldo Gugliemlmino, Procurador Del Tesoro de la Nacion, Government of Argentina, to Claudia Frutos-Peterson, Secretary of the ad hoc Committee, 7 April 2008, Re *Siemens AG v Argentina* (ICSID Case No ARB/02/08)

Letter from Lisa J. Gosh, Acting Assistant Legal Advisor, Office of International Claims and Investment Disputes, to Claudia Frutos-Peterson, Secretary General of the ad hoc Committee, Re *Siemens AG v Argentina* (ICSID Case No ARB/02/08) Annulment Proceeding